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Supreme Court, U.S.
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No. 95-

In The

Supreme Court of the United States

October Term, 1995

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965, Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, AND PAUL A. JACOBS,

Respondents.

Petition For Writ Of Certiorari To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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261 pp

QUESTIONS PRESENTED

The City of Culver City assessed Richard Ehrlich two fees in exchange for a specific plan amendment that was a necessary prerequisite for building a 30-unit residential condominium complex on the former site of a lawfully demolished private health and tennis club. The first fee levied was for $280,000, the cost of four public tennis courts. The second fee of $33,200 was for public art. Ultimately, after Ehrlich appealed and this Court granted certiorari and remanded the case, the California Supreme Court upheld the concept, but not the amount, of the recreation fee and upheld the arts fee.

1. Is it permissible under the Takings Clause of the United States Constitution to find that the public obtains a right in private property when the government imposes a restriction on the use of that property? Does it follow that if the restriction is removed then the property owner can be required to pay a fee in order to compensate the public for the public's "loss" of its right created by the prior governmental land use restriction?

2. May a government impose a fee upon a property owner as a condition to obtaining a specific plan amendment and escape heightened judicial scrutiny under the Takings Clause of the United States Constitution because the fee was authorized by legislation that is applicable to all similarly situated property owners?

3. Is there an "aesthetic regulation" exception to the Takings Clause of the United States Constitution wherein a requirement that a property owner pay for or build a public art project, subject to city approval, as a condition of obtaining a specific plan amendment is not subject to

QUESTIONS PRESENTED – Continued

heightened judicial scrutiny as required by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309 (1994)?

4. Does requiring a property owner to build and maintain public art upon his property, or pay a ransom in the form of an in-lieu fee, comprise a physical invasion violative of the Takings Clause of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

Richard K. Ehrlich, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust (Ehrlich), petitions that a writ of certiorari issue to review the published opinion of the California Supreme Court issued on March 5, 1996, with a rehearing denied on April 11, 1996.

ORDERS AND OPINIONS BELOW

This Court's prior order and the opinions below in this case are reproduced in the Appendix to this petition as follows:

Opinion and Associated Order Entered in Conjunction With the Judgment Sought to be Reviewed:

Appendix A: Opinion of the California Supreme Court issued March 5, 1996, published at 12 Cal.4th 854, 50 Cal.Rptr.2d 242, 911 P.2d 429 (Cal. 1996).

Appendix B: Order of the California Supreme Court denying rehearing on April 11, 1996.

Opinions and Associated Orders by Courts:

Appendix C: Unpublished Opinion of the California Court of Appeal, Second Appellate District, Division Five, entered on December 23, 1994.

Appendix D: This Court's Order of June 27, 1994, granting Ehrlich's petition for writ of certiorari and vacating prior Court of Appeal decisions, Supreme Court Case No. 93-842, reported at 512 U.S. ___, 114 S. Ct. 2731.

Appendix E: Opinion of Court of Appeal dated May 25, 1993, as published at 15 Cal.App.4th 1737, 19 Cal.Rptr.2d 468.

Appendix F: California Supreme Court's order of August 26, 1993, denying review.

Appendix G: Opinion of the California Court of Appeal filed January 25, 1993, is unreported.

Appendix H: Opinion of the Superior Court of California, County of Los Angeles, of September 6, 1990.

Orders on Rehearing:
Appendix J: Order of Court of Appeal on June 23, 1993, denying rehearing.
Appendix K: Order of Court of Appeal of March 30, 1993, resubmitting matter.
Appendix L: Order of the Court of Appeal of February 22, 1993, granting rehearing.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257.

The opinion of the California Supreme Court was issued on March 5, 1996. See App. A. After petitioner timely filed a petition for rehearing, the California Supreme Court denied that petition on April 11, 1996. See App. B. Pursuant to Supreme Court Rule 13, the time for filing this petition for writ of certiorari would run for 90 days from April 11, 1996, or until July 10, 1996. However, on June 6, 1996, this Court granted Ehrlich's motion for an extension of time to file this petition to August 9, 1996.[1]

STATUTES INVOLVED

The Fifth Amendment to the United States Constitution states in relevant part:

> Nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section One, of the United States Constitution states in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

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[1] The California Supreme Court remanded to the city the question of ***how much*** the public recreation "tennis court" fee should be. The issue on remand is not relevant to this petition because petitioner does not question here the ***amount*** of any tennis court fee, but whether ***any such fee may be imposed in the first place***. Certiorari, therefore, is appropriate at this stage of the proceedings.

The entire text of Culver City Ordinance No. 88-109 is set forth as Appendix N.

The entire text of Culver City Ordinance No. 89-026 is set forth as Appendix M.

STATEMENT OF THE CASE

If nothing else, the California courts are stubborn. After being told by this Court in *Ehrlich v. City of Culver City*, 512 U.S. ___, 114 S. Ct. 2731 (1994), to reconsider its earlier decision in this case in light of the then recent opinion in *Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309 (1994), the California Court of Appeal proceeded to reissue a new opinion that was identical to the one vacated, with the exception of the addition of several paragraphs and sentences that described the *Dolan* case. The California Supreme Court granted review. In its opinion, the California Supreme Court found that the City could legitimately levy a fee to compensate the City for the alleged loss of opportunity necessarily foreclosed by the approval of Ehrlich's project, but held the $280,000 fee in this case amounted to a taking insofar as the record was devoid of facts satisfying the rough proportionality standard of *Dolan*.

With respect to the $280,000 "tennis court" or recreation fee, the California Supreme Court held that such a fee could be imposed to compensate the public for the impact caused by the loss of the then current land use restriction of "public recreation." However, the court further held that the city had not properly justified the exact amount of $280,000 under a "rough proportionality" standard. The California Supreme Court upheld the arts fee, saying that it was equivalent to an aesthetic regulation. The court also found that legislatively imposed development fees are generally not subject to a heightened scrutiny analysis under the Takings Clause of the United States Constitution.

This case arises because the City of Culver City believes that it can use the occasion of granting a specific plan amendment as a means of satisfying its need for public amenities. Here the specific plan amendment allowed the construction of

condominiums on a vacant parcel of land that once had been the site of an abandoned and demolished private tennis and health club. The condominiums would be in conformity with the then existing general plan and zoning. The City argues that the granting of the specific plan amendment entitles it to $280,000 in order to build four new public tennis courts and either $33,200 for public art or $33,200 worth of acceptable public art. The California Supreme Court agreed inasmuch as it found that ***some*** recreational fee would be allowable and that the art fee was lawful.

A. Property History.

In September 1973, Ehrlich as president and sole owner of Downtown Development Corporation ("DDC") executed an agreement to purchase the subject site. Subsequent thereto, in early 1974, Ehrlich prepared a site plan and architectural drawings for a ***private*** tennis club to be erected on the site. Ehrlich submitted the plans to the City for approval. Appendix I-5. Ehrlich appeared at numerous planning commission and City Council meetings to answer questions and concerns of neighboring homeowners who vehemently opposed the use of the site as a recreational facility of any kind. Appendix I-5.

The specific plan in question was adopted in August 1974 by the City Council in lieu of the usual and customary procedure of site plan review. Appendix I-6. The City reports acknowledge that the City utilized the specific plan approach to "mitigate any adverse effects which might otherwise occur" due to the construction of Ehrlich's recreation facility on the site and to insure that ***no other C-3 uses, including recreational facilities other than Ehrlich's recreational facility, would be constructed and/or operated on the site***. Appendix C-40, 41. "***There is nothing in the record which indicates that the City imposed the specific plan limiting the use of the property to a private tennis club in order to preserve the land for future use as a tennis club or another form of recreational facility***". Court of Appeal dissent by Armstrong, J., Appendix C-40, 41, n. 1. In other words, Ehrlich neither agreed to, nor gave any servitude or other sort

of perpetual easement to the public for commercial recreational use of the land.

The purpose of the specific plan was to mandate the conditions upon which Ehrlich or anyone else could operate a private tennis club business, if at all, on his property. By its own terms the specific plan restricted and limited the construction of the tennis club as well as its daily operation. Appendix I-3. In addition, the specific plan mandated that the facility be a ***private*** facility available only to a limited number of members. By incorporating the site plan of Ehrlich's recreational facility into the specific plan, the specific plan, in effect, imposed restrictions on the exact nature, including size, placement, type and location, of each and every improvement down to the last tree and light. ***Changes to Ehrlich's facility were expressly prohibited.*** Any alteration of the improvements and operational procedures without amendment or removal of the specific plan would be unlawful and would result in closing of the facility as well as other civil and/or criminal penalties. Appendix I-4.

The purchase of the subject property was finalized in January 1975, with title vested in Ehrlich rather than DDC. The specific plan was amended in February 1975, permitting Ehrlich to build and operate the club. Appendix I-5.

Ehrlich developed and operated the site himself, or through others, as a ***private*** tennis club continuously through August, 1988. Appendix A-4, G-4. ***By 1981, a number of different operators of the private tennis club had gone out of business because operation of a facility under the restrictions imposed by the specific plan was not an economically viable use of the property***. Appendix A-5, G-4.

By 1981, Ehrlich applied to the City for a specific plan amendment in order to allow the development of the site as a commercial office building, consistent with the then existing C-3 zoning on the property. Appendix A-4, E-3, G-4. The request was denied. Appendix A-4, E-3, G-4.

B. The Demolition.

On or about March 23, 1989, Ehrlich with the City's approval obtained a demolition permit and demolished the recreational facilities on the site. Ehrlich donated all of the still useful equipment to the City, including the tennis court lights, nets, and lockers. Appendix A-6.

C. The Project Application.

On or about September 30, 1988, Ehrlich applied to the City for a specific plan amendment to allow development of the site into a 30-unit residential condominium townhouse development (the "Project"). Appendix A-5, E-4, G-3. ***The Project was consistent with the existing general plan and C-3 zoning.*** Appendix E-4, G-3. ***Consequently, approval of the Project did not require the City's approval to change or alter the existing zoning on the site.*** Appendix G-3.

D. The City's Interest in the Property.

Shortly after Ehrlich's submission of the application for the Project in September of 1988, the City expressed an interest in acquiring the site for use as a publicly owned and operated recreational facility. Appendix A-5, G-5. The City commissioned a feasibility study. The study concluded that Ehrlich's existing facility could not operate at a break-even or profitable basis in accordance with the restrictions imposed by the specific plan. *The report stated that a viable recreational facility would require changes to the building structure and layout of the facility which were not permitted by the specific plan.* The suggested changes included the removal of various tennis courts, destruction of the existing building, and the addition of at least 50 parking spaces. These changes would have required the acquisition through condemnation or purchase of land from neighboring properties, at a substantial expense. Appendix A-5, G-9. The City did not pursue the idea further. With the exception of the finding that the recreational facility mandated by the specific plan was not a viable use of the property, Ehrlich does not endorse the findings of this

study and thus did not attempt to purchase land from neighboring property owners or seek another specific plan amendment which would have allowed him to further risk his investment by building another club. Instead, as noted, he sought and obtained a demolition permit.

E. The $280,000 Exaction.

On April 10, 1989, the City Council disapproved Ehrlich's application (the "Disapproval"). This action was taken despite the fact that the City staff and Planning Commission had unanimously recommended approval of the Project, that the Project had widespread community support, and that the City had ***already*** given Petitioner permission to demolish the existing facility. Appendix A-6, E-4, G-4.

After the Disapproval, Ehrlich had numerous communications with the City. Appendix E-4, G-5. Ehrlich was informed that no project would be approved by the City unless Ehrlich agreed to ***build*** new ***public*** recreational facilities for the City. Appendix A-6, E-4, G-5.

As a direct result of Ehrlich's discussions with the City, in which the issue of whether Ehrlich should himself build four tennis courts was raised, the City Council reconsidered the Disapproval on July 3, 1989. The City Council then went into a lengthy, closed session to discuss the Project. Appendix A-6, E-4, G-5. After emerging from their closed session, the City Council voted to approve the Project including the condition that Ehrlich pay a $30,000.00 in-lieu park land fee pursuant to Culver City Municipal Code section 33-E.1. Appendix E-4, G-5. In addition, the Council imposed a requirement of payment of a monetary exaction of $280,000, the presumed cost of four tennis courts, to be spent by the City Council at some date in the future for public recreational facilities. Appendix A-6, E-4, G-5, L-5.[2]

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[2] The First Amendment implications of this provision were not addressed by this Court's prior vacation and remand in this case and will not be addressed.

F. The Arts in Public Places Exaction.

Culver City Ordinance No. 88-019 (the "Art in Public Places Exaction") requires Ehrlich to pay a $33,220 exaction to the City for Art in Public Places as a condition of obtaining a Final Certificate of Occupancy for the Project.[3] Appendix A-7, E-4, G-6, N-1-12. Ordinance No. 88-019 requires that art erected in the City pursuant to the Art in Public Places program be approved by the City after undergoing a critical City review process. *Id.*

G. The Litigation.

Ehrlich provided security for the disputed public art and recreation fees and filed a protest pursuant to California Government Code §§ 66020 and 66021. Opinion of California Supreme Court, Appendix A-7, 8, 10. The government code beginning at § 66000 provides the exclusive mechanism for challenging development fees which fail to meet a "reasonable relationship" standard. Appendix A-12-15. The protest filed under the government code was denied by the city. Appendix A-7.

On November 3, 1989, Ehrlich filed and served the Verified First Amended and Supplemental Petition for Writ of Mandate and Complaint seeking to invalidate both the $280,000 recreation exaction and the $33,200 Art in Public Places Exaction. Ehrlich argued, among other things, that both exactions were unconstitutional under Article I, Section 19, of the California Constitution as well as the Fifth and Fourteenth Amendments to the United States Constitution. Appendix E-5.

1. The Superior Court.

The Superior Court granted a writ of mandate vacating the $280,000 exaction stating that the exaction: (1) constitutes an unequal tax discriminatorily applied, and (2) that the

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[3] The fee calculated as 1% of the gross value of the project.

exaction constitutes a taking of private property without compensation. The court found that because the City could not compel Ehrlich to operate a recreational facility on the site there was no relationship between the Project and the need for public tennis courts in Culver City. The court found that the exaction was "simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer." Appendix A-8-9, E-5, H-4. The arts fee was upheld because it was "within the scope of the City's police power."

2. Court of Appeal I.

Although the California Court of Appeal initially affirmed the superior court decision, upon rehearing it reversed and upheld the $280,000 exaction despite the court's acknowledgment that the $280,000 bears no relationship to the burdens of the Project:

> "It is important to note that the mitigation fee was not imposed as a condition relating to the development project's burden on the community for increased community services, such as community recreational facilities . . . The mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City's approval of the townhome project and for the burden on the community resulting from the loss of recreational facilities." (Emphasis added.) *Ehrlich v. Culver City* (1993) 15 Cal.App.4th 1737, 1749-1750, Appendix E-9-10.

The Court of Appeal held that the Arts In Public Places Exaction did not constitute a taking of private property stating that Culver City could under its general police powers "require art to be placed on developments as a condition of approval" and that " . . . the mere giving of an option to the developer to pay a fee in lieu of the placement of art on the project does not convert the lawful permit condition into a fee, an exaction . . . or a taking". *Ehrlich v. Culver City, supra*, 15 Cal.App.4th at 1758, Appendix A-28-30.

The California Supreme Court denied review. *See* 15 Cal.App.4th at 1737. Appendix F-1.

3. The United States Supreme Court.

On June 27, 1994, this Court granted Ehrlich's petition for writ of certiorari and vacated the California Court of Appeal's decision. This Court's order read: "The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309." Appendix D-1.

4. Court of Appeal II.

On remand, a divided Court of Appeal re-issued the same opinion vacated by this Court with only minor revisions, namely the addition of a cursory discussion of *Dolan*. The court reached the identical conclusion as in the first reported appellate decision (Court of Appeal I), finding that *Dolan's* requirements were satisfied because (1) there was a "nexus" between the elimination of zoning that had restricted all uses except the existence of a private tennis club and the City's need to provide public facilities, (2) the $280,000 fee was supported by the City's unilateral findings that the value of the Project was $10,000,000, the value of the demolished improvements was $800,000, and that the price to construct four tennis courts at a new site was $275,000 to $300,000. Appendix C-19, 21. *Compare* to Appendix E-16.

The Court of Appeal declined to apply *Dolan* to the Art in Public Places exaction, stating "[t]he in lieu art fee is not an adjudicative decision conditioning a developer's permit on an individual parcel. Accordingly, *Dolan* has no applicability (cite omitted.)." Appendix C-34, n. 6.

5. The California Supreme Court.

The California Supreme Court granted review and issued its decision on March 5, 1996. The California court found that *Nollan* and *Dolan* could apply to the exaction of fees in the

context of land use permitting, at least when fees are imposed on only a few property owners one at a time rather than being uniformly or legislatively imposed upon a "broad class" of property owners. Appendix A-17. The court applied a *Nollan* and *Dolan* analysis to the $280,000 recreational fee. Appendix A-17, 34, 37. In analyzing the $280,000 tennis court fee the court first noted that by granting the specific plan amendment, Ehrlich's property could no longer be utilized as "commercial recreation." It noted that "the discontinuation of a private land use may have distinctly *public* consequences." Appendix A-34.

In response to arguments that this was a ***private*** health club, the court responded that "private status alone does not per se erase its intrinsic public value." Appendix A-34. "In short," the court concluded, "it is well accepted in both the case and statutory law that the discontinuance of a private land use can have a significant impact justifying a monetary exaction to alleviate it." Appendix A-34. ***The court did not provide any supporting citation.***

The court also noted that it had "no doubt as to the city's legitimate authority to impose development impact fees for park and recreational purposes." Appendix A-39. With that statement, the court upheld the imposition of ***some*** sort of tennis court fee, finding that the fee "will substantially advance its legitimate interest in correcting a demonstrated deficiency in municipal recreational resources." Appendix A-39.

Turning to the "rough proportionality" standard of *Dolan*, the court continued that the ***amount*** of the $280,000 recreation fee had not been adequately justified. The Court found that the loss of ***private*** tennis courts could not be equated with cost of building new ***public*** courts because the private courts could be financed by member dues. Appendix A-41-42. While noting that the "city may not constitutionally measure the magnitude of its loss, or of the recreational exaction, by the value of facilities it had no right to appropriate without payment," Appendix A-42, the Court continued to ponder what sort of fee ***could*** be imposed. It suggested that Ehrlich could be required to pay for the "additional administrative

expenses incurred in redesignating other property within Culver City for recreational use." Appendix A-42. In other words, "[i]t would be reasonable to require plaintiff to contribute toward defraying these anticipated rezoning costs, so that the city does not have to bear them itself or pass them along to future private developers seeking to construct recreational facilities." Appendix A-42.

Expanding on the theme that a fee could be used to attract other private developers, the court characterized the restriction previously imposed upon Ehrlich's ability to make use of his land as a "relinquished" land use "incentive." The court suggested that the city could impose a fee of sufficient magnitude that "would enable the city to induce private health club development by offering monetary incentives roughly proportional to the land use incentive it relinquished when it removed the recreational use restriction from the plaintiff's property." Appendix A-42-43.

Earlier in the decision the court noted that a legislatively imposed fee would not be subject to heightened scrutiny. *See* Appendix A-29. However, in discussing the Art in Public Places Fee, the court did not expressly indicate whether or not it was analyzing the fee under the heightened scrutiny required by *Nollan* and *Dolan*. Instead, it expressly upheld this fee on the basis that it was simply an aesthetic regulation well within the community's police power: "[The requirement . . . is more akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes, building materials and architectural amenities." Appendix A-45-46.

Two members of the court dissented on the recreational $280,000 tennis court fee issue. They argued first that it was doubtful that the City could have denied the specific plan amendment in the first place, and therefore would not have had the authority to impose these exactions. They suspected that such a denial would have been itself a taking because it did not appear that a private recreational club was an economically viable use of the land. Appendix A-83-84 (Kennard, J., dissenting). The dissenters found, however, that whether or

not commercial recreation was a viable economic use, the fee was still unconstitutional because the "lost opportunity" rationale was untenable since it would "require Ehrlich to bear a grossly disproportionate share of what is essentially a public expense." Appendix A-87-89. Requiring Ehrlich alone to bear the burden of providing the public with commercial recreation "impermissibly singled out Ehrlich's property for special treatment . . . akin to prohibited spot zoning." Appendix A-87.

REASONS FOR GRANTING REVIEW

At bottom this case presents a fundamental philosophical question on the nature of property ownership: Is private property owned and used by an individual for the benefit of that individual? Or is private property held in a quasi-trust by the community? In other words, to what extent does an owner have the right, subject of course to reasonable health and safety related permitting requirements, to make reasonable use of property? Can the government condition approval of a property owner's chosen use upon the payment of an indulgence designed to "compensate" the community for the "loss" of other potential uses that are foregone when the owner is permitted to put the property to the owner's chosen use? The opinion below of the California Supreme Court adopts the view that a landowner cannot make reasonable use of property unless consent is obtained and indulgences are paid. This is an unprecedented vision that is in conflict with history, tradition, and the fundamental underpinnings of the law of property as recognized by this and other courts.

This case is not about preventing any real harm to the community as a result of the new project. The courts below explicitly found that the challenged fees were not designed to mitigate any impacts caused by the construction of Mr. Ehrlich's condominiums. Appendix C-18-19, n. 3.

This case is not about preventing a loss of any existing and actual use of Mr. Ehrlich's property by the community. The tennis courts, swimming pool, and aerobics rooms had

already been lawfully abandoned and demolished when these fees were imposed. Appendix A-6, G-4.

This case is not about the loss of any indicia of the "quality of life" of the community such as open space, habitat, or the like. The granting of a specific plan amendment simply allowed Mr. Ehrlich to place new and different structures upon his property where other structures had previously stood. There is nothing in the record that purports to justify the challenged fees on the basis of the loss of any natural features.

Finally, this case is not even about a community's attempt to establish a particular quality of life for the new residents of the condominiums. As interpreted by the California Supreme Court, the recreational exaction was not designed to ameliorate any impact from the condominiums but is intended to compensate the public for modifying the restrictions previously imposed on the property. To the extent that the city found that the new residents would need a certain amount of public parks and open space, Mr. Ehrlich paid, without objection or protest, a $30,000 in lieu parkland fee for those specific purposes. Appendix A-7. Similarly, the record is devoid of any support that the Art in Public Places fee is necessary to ameliorate impacts from Ehrlich's condominium project.

What this case *is* about is an attempt to use the land use permitting power to force Mr. Ehrlich to pay a recreational fee in order to provide the community as a whole with recreational facilities. But the public never itself had the ***right*** to recreate on Ehrlich's land without Ehrlich's consent and willingness to invest in a commercial recreational enterprise. This case is also about whether the government can, under the guise of aesthetic regulation, force a landowner to reserve a portion of that owner's land and construct and place art upon it, or pay for substitute art.

I

IN UPHOLDING THE RECREATION FEE THE COURT BELOW IGNORES THE PRECEDENT OF THIS COURT AND IS IN CONFLICT WITH THE HOLDINGS OF OTHER COURTS

A. The Imposition of a Regulatory Restriction on an Owner's Right to Make Reasonable Use of Property Does Not Grant a "Benefit" to the Owner or Create a Public Right in the Property. To Hold Otherwise Conflicts With Established Principles of Property Ownership and Regulation.

In analyzing the public recreation fee, the court below transformed fundamental principles of property ownership and the premise of government regulation of property. The California Supreme Court found that when government changes a land use restriction imposed on property that change can allegedly create an impact on the public such that the government can demand mitigation from the landowner. The court below found that the mitigation is tied to the "impact of the land use change the city ***granted plaintiff***." Appendix A-42. But the imposition of a land use restriction neither creates a "benefit" in the property owner nor a "right" in the public to that restriction. A change in that restriction, therefore, does not grant or take away any "benefit" to the owner or affect any "rights" owned by the public. Thus, the specific plan amendment sought here cannot create the sort of public harm that can justify the exactions imposed by Culver City.

After determining that the exaction of a fee can implicate the takings clause, the California Court begins its analysis of the $280,000 recreation fee issue by noting that the collection of a fee, here for recreational use, "will substantially advance its legitimate interest in correcting a demonstrated deficiency in municipal recreational resources." Appendix A-40. But an existing deficiency is not relevant to the question of whether

government can make a landowner pay for correcting a deficiency when it changes the land use restrictions previously imposed on the owner's property.

With this passage, the California Court appears to be referring to the Takings Clause analysis that this Court spelled out in *Agins v. City of Tiburon*:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance legitimate state interests* . . . or denies an owner economically viable use of his land [citation]."

Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (emphasis added). Indeed, it was on the basis that the exactions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309 (1994) failed to advance a legitimate governmental interest that this Court struck down the exactions in those two cases. But no one ever argued that *some* public purpose could not be advanced by the coastal beachfront property dedication in *Nollan* or the public greenway and bicycle path in *Dolan*. The problem was that there was no *legitimate* public purpose served because the exactions had not been shown to ameliorate any impact caused by the development in *Nollan* or to ameliorate with enough precision the impacts alleged to have been caused by the development in *Dolan*. Likewise, no alleged impact caused by Ehrlich's specific plan amendment can justify the exactions imposed by the City.

The fact that Ehrlich's property was designated as "commercial recreation" did create the "potentiality" that somebody might someday place some sort of new commercial recreation facility on the property.[4] But even if that potentiality were significant, that would not be enough to find any legitimate state interest in requiring Ehrlich to pay for public

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[4] The fact that Ehrlich lost money on such an enterprise for over a dozen years makes such a potentiality vanishingly small – at least on Ehrlich's parcel without the purchase of neighboring property and obtaining a new specific plan amendment.

recreation because Ehrlich was not responsible for the "demonstrated deficiency in municipal recreational resources." Just because the government previously imposed a "commercial recreation" restriction on the use of his property does not mean that the government also imposed upon Ehrlich the duty to actually provide such "commercial recreation" or even the potential of such recreation. The imposition of a land use restriction is not the same thing as the imposition of a duty to provide the use allowed by the restriction.

It is important to reiterate that this fee was ***not*** imposed because of any impact of the ***development*** of the condominiums themselves. Appendix C-18-19, n.3. The fee was allegedly designed to mitigate for the loss of the preexisting land use restriction – even though the facilities had already been lawfully removed. Appendix C-18. Under the reasoning of the court below, every time the zoning or land use restriction of property changes the public loses something – whether that be the lost recreational opportunities of this case, or lost employment opportunities if commercial property is rezoned to recreational, the lost food opportunities if agricultural land is rezoned as commercial recreational, or the lost housing opportunities if residential land is rezoned into anything else. Furthermore, it would make no difference ***who*** initiated the change in the governmentally imposed land use restriction, whether it be the owner, the planning staff, or neighbors. Every time the use of land is changed the public theoretically loses ***some*** potentiality that the landowner could be required to mitigate.

The fact that Culver City allegedly has a pre-existing shortage of commercial recreational facilities may be unfortunate, but it is not Ehrlich's fault or sole responsibility. There is nothing in the record of this case that suggests that Ehrlich had undertaken any sort of *duty* to provide public recreation. At the time the city council imposed the $280,000 recreational fee, the tennis courts on his property were long gone with the City's approval. There is absolutely no precedent in the law of California or elsewhere for the notion that once property is impressed with a particular land use restriction the community owns a perpetual easement or servitude in the

continuation of that use – ***whether or not*** the property is actually being put to that particular use.

As noted by Professor Kmiec, it would be an "extraordinary notion" "that once a private landowner has undertaken a permitted common law use, like [construction of] a private swimming pool or tennis court, he either must continue that use or must pay to stop." Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 Harv. J.L. & Pub. Policy 147, 156, n. 43 (1995).

B. The Imposition of a Duty on a Land Owner to Provide Previously Zoned Land Uses Would Entail a Redefinition of Property Rights in California – a Result Proscribed by This Court.

It is beyond debate that under the law of California a property owner such as Ehrlich has no right to the ***existing*** zoning on his undeveloped property. *See, e.g., Avco Community Developers, Inc. v. South Coast Regional Commission*, 132 Cal.Rptr. 386, 393, 17 Cal.3d 785, 796 (Cal. 1976) ("[i]t is beyond question that a landowner has no vested right in existing or anticipated zoning.") If the community ***legitimately*** determines that it is in the public interest to rezone property the owner of undeveloped property has no right to prevent the rezoning – except in those rare circumstances where a downzoning may be so severe as to deny economically viable use of the property.[5]

Under the decision of the California Supreme Court, the public has been given greater expectations in the existing zoning than an owner. The owner has no right to build in a way that is compatible with current zoning, but the public has a ***right*** to an exaction from the property owner if the community determines that a new zoning or land use restriction is appropriate. In effect, the public would own a servitude over all property with any governmentally imposed land use restriction. To create this servitude all the government has to

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[5] Spot zoning or zoning for arbitrary or capricious reasons would not, of course, be legitimate.

do is zone a parcel of property. Under existing law, the property owner would generally receive no compensation when the servitude is imposed, *Avco, supra*. Now, however, according to the opinion below, the owner will have to pay when it is removed or changed.

To find that such a servitude exists would be nothing less than a dramatic rewriting of real property law in California.[6] Such a redefinition of property would be at odds with this Court's proscriptions in *Lucas v. So. Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886, 2892 (1992) (in context of physical invasions "the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits"); *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) ("a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all"); *See also Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235 (1897) (noting that if the final judgment of a state court results in a taking of property that would be a violation of the 14th Amendment.)

The California Supreme Court's holding undermines fundamental principles of property ownership and regulation and will lead to untenable results. The settled expectations held by property owners for generations have been changed. The court below has developed a new two-part rule of property: (1) Once property is restricted for a particular use it must always be restricted for that particular use – unless the government changes the restriction and (2) if the government

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[6] The rights in property have long been considered more than simply the right to the present use. "An important element in a property owners's bundle of rights is the right to economically sell the land for the best price available in the market, based not only on its current use but on potential other uses." *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996) *citing United States v. Causby*, 328 U.S. 256, 261 (1946) ("[m]arket value . . . may reflect the use to which the land ***could readily be converted***, as well as the existing use.") (emphasis added).

changes the land use restriction it can charge the owner for the change in order to provide the pubic with the opportunity to enjoy any uses that were not forbidden by the prior restriction.

This rule, in accordance with the opinion below, would apply to any type of use to which property had previously been put, or could have been put, in conformance with previous land use restrictions. Suppose that the land use restrictions on three parcels of property allowed for the community's only grocery store, law office, or a saloon, respectively. To paraphrase the decision below, if the land use restrictions were changed so that only different uses were allowed, the owner might have to pay, "a fee that would enable the city to induce private [grocery store, law office, or saloon] development by offering monetary incentives roughly proportional to the land use incentive it relinquished when it removed the [grocery store, law office, or saloon] use restriction from [the owner's] property." Appendix A-43. Theoretically, this could mean a fee for grocery delivery charges, a legal advice hotline, or lost "socialization" opportunities represented by the loss of an adequate community liquor supply.

Indeed, as will be shown next, the notion that certain fees can be charged when a use restriction on property is removed or changed is in conflict with the holdings of other state courts.

C. There is a Conflict Among State Courts Regarding the Degree to Which Property Owners Can Be Forced to Pay Fees When Existing Uses are Discontinued.

What if Ehrlich had built rental housing and the market collapsed so that he could no longer obtain an appropriate return on his investment? Could he be required to pay a bounty to the city for its lost housing opportunities if he requested a change in land use that would allow him to stop renting apartments or to build commercial recreation? Indeed, it is on this very question that the courts of California and New York are in conflict. Implicit in the decision below, and explicit in prior California appellate court decisions (cited in

a concurring opinion in *Ehrlich*, Appendix A-72 (Mosk, J. concurring)) is the notion that owners of rental property can be forced to pay a tribute in order to exit the rental business. *See e.g. Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal.App.3d 892 (1986) (upholding ordinance requiring payment of tenant "relocation assistance" and constructing, rehabilitating, or paying for one-for-one replacement of converted rental housing prior to converting rental units to any other use).

In two other cases, courts have upheld low income housing fees after downplaying the impact of this Court's recent takings decisions. In *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991) *cert. denied* 118 L.Ed.2d 593 (1992) the Ninth Circuit suggested that the level of scrutiny did not change as a result of *Nollan*, at least where a "physical encroachment on land" was not involved. Similarly, in *Garneau v. City of Seattle*, 897 F. Supp. 1318, 1325 (W.D. Wash. 1995) a district court upheld a tenant relocation fee after speculating that *Nollan* and *Dolan* did not change the level of scrutiny when physical encroachments were not involved.

However, the notion that such relocation fees were constitutional was explicitly rejected in *Seawall Associates v. The City of New York*, 74 N.Y.2d 92, 544 N.Y. Supp. 2d 542, 542 N.E.2d 1059 (1989) where New York's Court of Appeals held that fees imposed on the owners of single-room occupancy hotel were unconstitutional because imposing the financial burden of providing low cost housing solely on the owners of these units failed to substantially advance a legitimate governmental interest and was, therefore, an unconstitutional taking without just compensation under the standards of *Agins* and *Nollan*.

These cases are different from the present case in one significant respect. In *Terminal Plaza* the rental use was an ***existing*** use at the time the owners wished to change the use. In *Seawall* the rental building existed, although it was empty at the time. Here, of course, the use had already been lawfully abandoned and only vacant property remained. Because there

is a conflict among states in those situations where a government attempts to impose a servitude on a landowner attempting to abandon an existing use, which the public was to "lose" the opportunity to enjoy, there is surely even more of a conflict with the present case, where the use had already been lawfully terminated.[7]

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[7] The California Supreme Court found that heightened scrutiny applies to the imposition of monetary exactions imposed on the use of property, but with other courts questioning the relevance of the analysis of *Nollan* and *Dolan* to exactions other than real property exactions, there is a confusion in the lower courts that affects all landowners. This Court should grant review to resolve the conflict.

For example, in *City of Portsmouth v. Schlesinger*, 46 F.3d 133, 135 (1st Cir. 1995) the court applied *Dolan* to the imposition of a fee, finding that "no rational nexus existed between the amount of the Developers' promissory note and any burden imposed on the City due to the zoning change." And in *Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994) the imposition of excessive drainage mitigation fees was found to violate the Takings Clause; *See also Northern Illinois Home Builders Assoc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) (transportation development fee); *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347, 1350 (1994) (fees can be subject to heightened scrutiny); and *Trimen Development Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994) (park fee struck down). *See also Aspen-Tarpon Springs, Ltd. v. George Stuart*, 635 So.2d 61 (Fla. App. 1994) (Florida Mobile Home Act's relocation expenses found unconstitutional taking that unfairly singled out park owners thus failing to substantially advance legitimate governmental interest test of *Agins*). *See also*, Jason Biggs, *Nollan and Dolan: The End of Municipal Land Use Extortion – A California Perspective*, 36 SANTA CLARA L. REV. 515, (1996); *but see McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kansas, 1995) (finding *Dolan* does not apply to imposition of transportation fees).

II

EXCEPTING LEGISLATIVELY IMPOSED FEES FROM HEIGHTENED SCRUTINY IS AN UNCONSTITUTIONAL EVASION OF THE PRINCIPLES OF NOLLAN AND DOLAN

A. All Monetary Exactions Imposed in Exchange for a Change in Land Use Are Subject to Heightened Scrutiny, Whether or Not They Are Individually or Legislatively Imposed.

Thus, the Supreme Court of California got it right when it found that certain fees such as the tennis court fee should be subject to heightened scrutiny. But its analysis broke down when it found that the only rationale for the heightened scrutiny was that the "discretionary context" of the permitting process "presents an inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends." Appendix A-17. This may be true, but there is no more of a risk to the landowner of governmental overreaching when a permit condition is concocted during the "give and take" of the permitting process then when the condition is created in advance by a city council looking for off-budget methods of financing public projects.[8] Indeed, some of the aforementioned cases relied upon in *Dolan* involved legislatively imposed fees. *See e.g. Collis v. Bloomington*, 246 N.W.2d 19, 26 (Minn. 1976) (striking down a legislatively imposed 10% land or in lieu fee exaction); *Call v. West Jordan*, 202 P.2d 217 (Utah 1979) (striking down legislatively imposed 7% land or in lieu exaction).

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[8] The danger was described in *Pennell v. City of San Jose*, 485 U.S. 1, 21, 108 S. Ct. 849, 863 (1988) (Scalia, J. dissenting) ("[t]he politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and thus relative immunity from normal democratic processes.")

In fact it is arguable that there is ***more*** of a risk of the arbitrary and confiscatory imposition of fees in the legislative context when government imposes exactions on the development of new residential housing because the prospective residents who will bear the costs of the exactions may not yet be voting citizens in the community.

Since *Dolan*, several other state courts have subjected the imposition of legislatively imposed development fees to the heightened scrutiny standards of *Dolan* and *Nollan*. *See e.g. Northern Illinois Home Builders Assoc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) (utilizing *Dolan* analysis to strike down legislatively imposed transportation development fee); *Trimen Development Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994) (applying *Dolan* takings analysis to legislatively imposed park impact development fee)[9]; *See also J.C. Reeves Corp. v. Clackamas County*, 131 Ore. App. 220 (Oregon App. 1994) (land dedication requirement subject to Takings Clause even if legislatively imposed).

Other courts, however, have found that legislatively imposed exactions are immune to heightened scrutiny takings analysis. None of these courts, however, can be accused of analyzing in detail the impact of the dedication on the property owner's ability to exercise the right to use property rather than relying on a formalistic "legislative" versus "adjudicative" distinction. *See e.g. Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d at 1351 (Ariz. 1995) (although fees are subject to takings analysis, if legislatively imposed they will survive challenge); *Southeast Cass Water Resource District v. Burlington Northern Railroad Co.*, 527 N.W.2d 884, 896 (North Dakota 1995) (requirement that railroad pay for water improvement related infrastructure upheld against takings challenge because legislatively imposed).

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[9] For an analysis of the takings implications of legislatively imposed fees in Washington State, see Note and Comment, Joseph Lee, *Sudden Impact: The Effect of Dolan v. City of Tigard on Impact Fees in Washington*, 71 WASH. L. REV. 205 (1996).

In any event, the distinction of "legislative" versus "adjudicatory" imposition of fees will be a chimerical one at best. A line has been drawn by the court below. On one side, for exactions imposed pursuant to legislative processes, the heightened scrutiny test will not apply. On the other side, for fee exactions imposed as part of the "give and take" of the adjudicative process, the heightened scrutiny standard will apply.

This line is meaningless in California where virtually all significant land use decisions are "legislative." In this case the California Supreme Court found that the recreation fee was imposed as part of the adjudicative process and therefore deserved heightened scrutiny review. What the court below forgot was that it had previously ruled, repeatedly, that specific plan amendments are ***legislative*** acts, not adjudicatory. *See e.g. Yost v. Thomas*, 36 Cal.3d 561, 570 (1984) (rezoning of land, the adoption and amendment of specific plans are all legislative acts); *Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511, 521 (1980) (amendment of zoning ordinance a legislative act).

To the extent that the court below was relying on the distinction between legislative and adjudicative acts based upon the broad applicability of the former, this has no relevance to the question of whether a particular fee is at all related to any legitimate impacts caused by the use of property. Even broadly applicable land use regulations can be highly abusive.[10] In *Avco*, for example, the California Supreme Court held that a legislative change in land use restrictions would apply even to a developer who had expended over two million dollars in reliance upon an existing tract map and grading permit. *Avco*, 17 Cal.3d at 790. The lack of the "give and take" of the permitting process in

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[10] Indeed, in *Nollan* the Coastal Commission applied a broadly applicable regulation in that it had "similarly conditioned 43 out of 60 coastal development permits along the same tract of land" and the other 17 were not on the beachfront or were approved prior to the regulations. 483 U.S. at 829.

the context of a legislatively imposed exaction is no bulwark against abusive governmental action.

It is critical in this regard to note that the "heightened scrutiny" standard flows from the fact that government is attempting to restrict the exercise of the right to use real property. It is not dependent on the nature or origin of the particular condition imposed on the use of property. In other words, what matters is that an owner is being restricted from exercising the right to use real property unless the owner provides some sort of bounty. It does not matter whether the particular bounty is an exaction of land or of money, or that the exaction is imposed individually by a city council or pursuant to a general ordinance.

What is important is not that the condition is imposed in the context of an individualized proceeding, but that it is imposed at all in the context of an individual attempting to make lawful use of property while the government says "no – not unless you comply with our conditions." Individually created or broadly applicable, to a landowner it boils down to the same thing, a person is being forced to provide an exaction to the community that is unrelated or only loosely related to any impact caused by the actual use of the property. ***This*** is the fundamental reason for heightened scrutiny, and not the origin of the exaction or even the nature of the precise thing that is being exacted. With this case, this Court can clarify once and for all the rationale behind its holdings in *Nollan* and *Dolan* and their applicability to Ehrlich's situation.

B. There Is No Aesthetic Regulation Exception to the Takings Clause.

The California Supreme Court upheld the Art in Public Places fee because it was "more akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes" which are "valid exercises of the city's traditional police power." Appendix A-46. This is far too facile an analysis. All the conditions imposed in aesthetic type regulations generally inure to the

benefit of the owner's property, whether or not the owner finds them desirable. This is part of the "average reciprocity of advantage" so fundamental to modern land use regulation. *See, e.g., Pennsylvania Coal v. Mahon*, 260 U.S. 393, 414 (1922). But the imposition of a fee for public art, which might or might not be placed on or near the subject property (here it was) inures more to the benefit of the community than the property itself thus requiring more than a simple inquiry into whether the regulation is consistent with the police power.

In *Nollan*, the beachfront dedication surely would have benefitted the public, and acquiring the beach would have been arguably a legitimate exercise of the police power. Nevertheless, the beach dedication condition was found violative of the constitution. In *Dolan*, the greenway and bikepath would similarly have relieved a perceived flood danger and traffic problem, and the acquisition of the facilities would have been within the exercise of the police power. But again, the exactions were struck down because the city had not proven that Mrs. Dolan should pay for them. In *Lucas*, this Court found that just because the regulation served an important public purpose within the scope of the police power it would not be immune from takings analysis unless the regulation served to prevent a genuine nuisance.

Here, just because public art supposedly benefits the public, and because the thrusting of such art upon the public is arguably within the scope of the police power, does not immunize this scheme from a takings analysis. There is no "aesthetic regulation" exception to the Takings Clause.

The relevant inquiry should have been whether the requirement that Ehrlich set aside 1% of the value of the proposed project for art forced him "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A Takings Clause inquiry here cannot be abandoned until two questions are answered. First, a court should inquire whether the land use at issue creates any need for public art. Second it must be asked whether requiring a property owner to acquire, construct, place, and maintain public art, or pay an in-lieu fee, is imposing a burden on the

use of his property that is out of proportion to legitimate public concerns and and impacts created by the use of the property. Indeed, in this case, the very fact that the ordinance allows landowners to "buy" their way out of the public art requirement leads to the conclusion that the public interest is perhaps less critical than it is for other land use restrictions that lack such a buy out provision. *See Seawall*, 542 N.E.2d at 1069.

Review is necessary in this case in order to determine whether the imposition of exactions are immune from Takings Clause analysis simply because the exactions mirror aesthetic regulations that are within the police power.

C. A Property Owner Who is Required to Either Pay an Extortionate Fee or Place Public Art on His Property Has Been Subject to a Physical Invasion.

This Court has always found physical invasions of property to be takings, whether the invasion be by flooding, *Pumpelly v. Green Bay & Mississippi Canal Company*, 80 U.S. 166 (1872), boaters, *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), or cable boxes, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). It is not the amount of land that counts or even the money represented. *Loretto* certainly involved a very small invasion. The principle is not dependent upon whether or not people are able to trespass upon the property. In *Pumpelly* and *Loretto* there was no significant trespass by people. Instead, what matters in these cases is that each one represents a situation where the owner has lost the fundamental dominion over the affected land that is the sine qua non of property ownership. As this Court found in *Loretto*, the injury to the owner occurs when the owner "must permit another to exercise complete dominion" over a portion of the owner's land. Put another way, "[t]he Government does not have the right to declare itself a cotenant-in-possession with a property owner." *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). The owner no longer has any choice over what can be done with the property and the owner can no longer choose to exclude

trespassers or objects from his land. The government has made the choice already. In essence, the owner is no longer the owner.

The placement of public art, or a requirement that an owner pay a ransom so that art can be placed somewhere else, is no different. Either the owner submits involuntarily to losing all control and dominion over a portion of his property, or he can buy his way out. This Court has already made it plain that citizens do not have to buy their rights already guaranteed by the Constitution. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit." *Dolan*, 114 S. Ct. at 2317. Here the analysis is the same. Culver City cannot force Ehrlich to give up his constitutional right to exclude public art from his property or to force him to pay a fee when both the art and the fee are unrelated to any impact caused by the project.[11]

This Court has been zealous in protecting individuals from being made to suffer physical invasions of their property without the payment of just compensation. Here the only way Ehrlich could have avoided a physical invasion is if ***he*** paid compensation to the city. This may be a clever attempt to

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[11] Another reason why the Art in Public Places Fee should perhaps be subjected to heightened scrutiny under the Takings Clause is because the combination of the First Amendment implications of this case with the takings implications. *See Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881-82 (1990) (regulations that implicate "the Free Exercise Clause in conjunction with other [First Amendment related] constitutional protections" receive higher scrutiny) and *Keller v. State Bar of California*, 496 U.S. 1, 11 (1990) (the right ***not*** to speak protected by the first Amendment.) Here Ehrlich has been forced to either pay a fee or to display art against his will and that is subject to city approval.

avoid the constitution, but it is not an appropriate one. This Court should grant certiorari.

CONCLUSION

Ehrlich has been to this Court before. He is being forced to pay a recreation or tennis court fee in exchange for a specific plan amendment that would change the use of his vacant land from commercial recreation to residential. He is being forced to accept public art on his property or pay the City of Culver City a fee so it can place public art elsewhere. In both cases there is no showing that Ehrlich is responsible for either the public "need" of the tennis courts or the art. Culver City and the court below have transformed the law of property and zoning in California into the law of the convenient patsy. This Court should accept this petition for writ of certiorari to resolve conflicts with decisions of this Court and with decisions of other states and the federal courts.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

RICHARD K. EHRLICH, Plaintiff and Appellant, v. CITY OF CULVER CITY ET AL., Defendants and Appellants.	)	S033642 Ct. App. 2/5 B055523 Los Angeles Super. Ct. No. C730079

(Filed Mar. 5, 1996)

This case comes to us by a circuitous route, having been remanded after the United States Supreme Court issued a writ of certiorari to the Court of Appeal and vacated that court's judgment in favor of defendant City of Culver City. The high court's order of remand directed the Court of Appeal to reexamine its prior judgment "in light of *Dolan v. City of Tigard* (1994) 512 U.S. ___, 114 S.Ct. 2309. . . . " (*Ehrlich v. City of Culver City* (1994) 512 U.S. ___ [114 S.Ct. 2731].)

Following remand, a divided Court of Appeal reaffirmed its earlier ruling in favor of defendant city in an unpublished opinion. We then granted the petition for review by plaintiff, a property owner and developer, to consider important and unsettled questions concerning the extent to which the high court's opinions in *Dolan v. City of Tigard* (1994) 512 U.S. ___ [114 S.Ct. 2309] (*Dolan*) and the earlier case of *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 (*Nollan*) apply to development permits that exact a *fee* as a condition of issuance, rather

than, as in both *Nollan* and *Dolan*, the *possessory* dedication of real property.

As we explain, we conclude that the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining whether a compensable regulatory taking has occurred under the takings clause of the Fifth Amendment to the federal Constitution apply, *under the circumstances of this case*, to the *monetary* exaction imposed by Culver City as a condition of approving plaintiff's request that the real property in suit be rezoned to permit the construction of a multi-unit residential condominium. We thus reject the city's contention that the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies *only* to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval.

We arrive at this conclusion not by reference to the constitutional takings clause alone, but within the statutory framework presented by the Mitigation Fee Act. (Gov. Code, section 66000 et seq.) We will conclude in this case that, in order to avoid substantial questions concerning the constitutional sufficiency of the legislative standard embodied in the Act, the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining when a regulatory taking has occurred apply here to the Act's requirement that the local regulatory authority demonstrate a "reasonable relationship" between the monetary exaction and the public impact of the development.

We thus interpret the Act's "reasonable relationship" standard, as applied to the development fee at issue in

this case, as embodying the standard of review formulated by the high court in its *Nollan* and *Dolan* opinions – proof by the local permitting authority of both an "essential nexus" or relationship between the permit condition and the public impact of the proposed development, and of a "rough proportionality" between the magnitude of the fiscal exaction and the effects of the proposed development.

Applying this standard in this case, we conclude, first, that the city has met its burden of demonstrating the required connection or nexus between the rezoning – to permit a residential use of a parcel of land zoned for private recreational use – and the imposition of a monetary exaction to be expended in support of recreational purposes as a means of mitigating that loss. We conclude, however, that the record before us is *in*sufficient to sustain the city's determination that plaintiff pay a so-called mitigation fee of $280,000 as a condition for approval of his request that the property be rezoned to permit the construction of a condominium project. Because the city may be able to justify the imposition of *some* fee under the recently minted standard of *Dolan*, we follow the Oregon Supreme Court's disposition in that case and direct that the cause be remanded to the city for additional proceedings in accordance with this opinion.

I

Factual and Procedural Background

A

Between 1973 and 1975, plaintiff acquired a vacant 2.4-acre lot on Overland Avenue in Culver City and obtained city approval to develop the site as a private

tennis club and recreational facility. At plaintiff's request, the city amended its zoning and general plan ordinances governing uses on the property from a split zone R-1 (single family residential) and C-2 (retail commercial) to C-3 (commercial). A specific plan was also adopted by the city providing for the development of a privately operated tennis club and recreational facility.[1] A report prepared by city planning officials in 1974 recommending approval of the development permit recognized that "the need for additional tennis facilities in this city is a real one"; the planning commission resolution recommending approval likewise observed that "[t]he proposed zoning of the property in conjunction with the specific plan will provide a suitably located area within the City for additional tennis club facilities in the form of a private tennis club." From 1975 to 1988, plaintiff, alone or through others, operated the sports complex – consisting by then of a swimming pool, five tennis courts, racquetball courts, weight training and aerobic facilities – on the site.

In 1981, in response to financial losses, plaintiff applied to the city for a change in land use in order to construct an office building on the site; that application was abandoned after the city planning commission recommended against approval on the ground that the existing sports and tennis club provided a needed commercial recreational facility within the city. The club continued in operation under a series of managers until

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[1] A "specific plan" implements and refines the general plan by allowing for greater specificity as to permissible uses. (Gov. Code, § 65450.)

August 1988, when plaintiff closed it as a result of continuing financial losses. The following month, he again applied to the city for an amendment to the general plan, a zoning change and amendment of the specific plan to allow construction of a 30-unit condominium complex valued at $10 million.

Shortly after the submission of plaintiff's application, the city expressed an interest in acquiring the property for operation as a municipally owned sports facility and hired outside consultants to study the feasibility of the acquisition. The impetus behind the city's interest was a perceived deficiency in existing municipal recreational facilities. Buying the property, according to a city council staff report, offered the "opportunity to preserve an existing sports/recreational facility for public use and relieve pressure on existing facilities." The feasibility study concluded that, by national standards, the city was two to four tennis courts short, and deficient in the number of its public swimming pools and gymnasiums. The study also concluded that plaintiff's club had encountered financial problems through a combination of management problems, poor maintenance, and a lack of competitive amenities offered by other clubs. Without extensive capital improvements, the study concluded, the club could not "compete financially in today's health and fitness market."

Based upon the findings of the study, the city concluded that it lacked the funds to purchase and operate the club as a general public sports complex, and would incur substantial financial risks if it purchased and operated the club on a limited membership, fee-for-service basis. In April 1989, the city decided not to purchase the

property. At the same time, the city council disapproved plaintiff's application based on concerns over the loss of a recreational land use needed by the community. In the meantime, plaintiff obtained a demolition permit and tore down the existing site improvements. The still useful equipment, including the tennis court lights, nets, and lockers, he donated to the city.

Following the rejection of his application, plaintiff entered into discussions with members of the city council and city staff in an attempt to restructure the project. He asserts that he was informed the project would not be approved *unless* he agreed to build new recreational facilities for the city. In response, plaintiff apparently raised the possibility of constructing four new municipal tennis courts. During this time period plaintiff filed, but did not serve, a petition for writ of mandate and complaint for damages commencing this lawsuit. Following a closed-door meeting ostensibly to discuss the pending litigation, the city council voted to approve plaintiff's application conditioned upon the payment of certain monetary exactions. In lieu of the construction of four tennis courts as a condition of approval, the city required the payment of $280,000 "to be used" as stated in the ratifying ordinance, "for additional [public] recreational facilities as directed by the City Council." The minutes of the city council meeting state that the $280,000 fee was to be used "for partial replacement of the lost recreational facilities . . . " occasioned by the specific plan amendment. The amount of the fee was based upon a city study which showed that the replacement costs for the recreational facilities "lost" as a result of amending the specific plan would be $250,000 to $280,000 for the pool, $135,000 to 150,000 for

the paddle tennis courts, and $275,000 to $300,000 for the tennis courts.

In addition to the $280,000 recreation fee, the city also required plaintiff to pay an exaction under the city's "Art in Public Places" program. By municipal ordinance, new residential development projects of more than four units, as well as all commercial, industrial, and public building projects with a building valuation exceeding $500,000, are required to provide "art work" (as defined by the ordinance) for the project in an amount equal to 1 percent of the total building valuation, or to pay an equal amount in cash to the city art fund. The city valued plaintiff's project at $3,200,000. He elected initially to pay the fee, which totaled $33,200, but his successor in interest apparently subsequently placed art of his own choosing on the site rather than pay the in-lieu fee.[2]

Thereafter, plaintiff filed with the city formal written protests to the imposition of the $280,000 recreation fee and the $32,000 Art in Public Places exaction, pursuant to Government Code sections 66020 and 66021. The city rejected both protests. Plaintiff then amended his complaint to allege that imposition of the fees amounted to an unconstitutional taking without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 19 of the

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[2] Plaintiff was also apparently required to pay a $30,000 in-lieu "parkland" fee pursuant to section 33-E.1 of the Culver City Municipal Code, to provide ostensibly for local park and recreational facilities to serve the residents of plaintiff's condominium development. Plaintiff has not challenged this in-lieu fee in the present action.

California Constitution.[3] The parties later entered into an agreement whereby plaintiff agreed to pay the $280,000 recreation fee under protest in exchange for the necessary building and grading permits for the project. Plaintiff retained the right to proceed with his lawsuit, and agreed that the city would obtain a lien on the property as security for payment of the $280,000 fee. The site was subsequently developed and residential units were sold to the public.

B

The petition for writ of mandate, by which plaintiff sought to set aside the $280,000 recreation fee and the $33,200 in-lieu art fee as unconstitutional takings, was bifurcated from the balance of the complaint. Following a hearing, the trial court invalidated the $280,000 recreation fee, holding that there was "no reasonable relation . . between the plaintiff's project and the need for public tennis courts in the City." The trial court concluded that the exaction was "simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer." The trial court

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[3] The Fifth Amendment provides that "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment was made applicable to the states through the Fourteenth Amendment in *Chicago, B & Q Ry. Co. v. Chicago* (1897) 166 U.S. 226.

The parallel provision of the California Constitution provides, "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner." (Cal. Const., art. I, § 19.)

declined to set aside the $33,200 art fee, however, ruling that it was not an unconstitutional taking.

The Court of Appeal initially affirmed the judgment in its entirety but on rehearing modified its opinion to reverse that portion of the judgment invalidating the $280,000 recreation fee. (*Ehrlich v. City of Culver City* (1993) 15 Cal.App.4th 1737.) The Court of Appeal found there was a "substantial nexus" (*id.* at p. 1749) between the proposed condominium project and the $280,000 exaction. "The mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City's approval of the townhome project and for the burden to the community resulting from the loss of recreational facilities." (*Id.* at p. 1750.) Thus, the recreation fee was not, in the Court of Appeal's judgment, an unconstitutional taking without just compensation. The Court of Appeal also affirmed that portion of the judgment upholding the in-lieu art fee.

Plaintiff then sought certiorari from the United States Supreme Court. The high court granted his petition, vacated the Court of Appeal judgment, and remanded the case for further consideration in light of its opinion in *Dolan*. (*Ehrlich v. City of Culver City, supra*, 512 U.S. ___ [114 S.Ct. 2731].) As noted, following remand, a divided Court of Appeal reached the identical result. In addition to its earlier conclusions, it found that the $280,000 fee was "roughly proportional" in nature and extent to the needs generated by the project, and therefore passed muster under *Dolan, supra*, 512 U.S. ___ [114 S.Ct. at pp. 2319-2320]. We granted plaintiff's petition for review and now reverse.

II

The Mitigation Fee Act (Gov. Code, § 66000 et seq.)

As noted, this case arises within the statutory framework of the Mitigation Fee Act (the Act), introduced in the Legislature as Assembly Bill No. 1600, 1987-1988 Regular Session, and enacted as Statutes 1987, chapter 927, effective January 1, 1989. The Act, codified as sections 66000-66003 of the Government Code, sets forth procedures for protesting the imposition of fees and other monetary exactions imposed on a development by a local agency. As its legislative history evinces, the Act was passed by the Legislature "in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects." (*Centex Real Estate Corp. v. City of Vallejo* (1993) 19 Cal.App.4th 1358, 1361; Sen. Local Gov. Com. analysis of Assem. Bill No. 1600 (1987-1988 Reg. Sess.) p. 1; see also *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320.)

Plaintiff complied with the requirements of Government Code section 66020 by filing a protest with the city which enumerated all of the bases of his challenge to the recreational and art fees, including his constitutional takings claim. These claims were subsequently set forth in the complaint and writ petition. In the subsequent agreement between plaintiff and the city, plaintiff agreeg [sic] to pay the disputed fees and to have a lien recorded against the property, and the city agreed to allow the project to proceed, and further stipulated that "[n]othing in this agreement shall in any way waive or restrict [plaintiff's] rights to pursue the protest [plaintiff] has

made under [former] Government Code § 66008 [now section 66020] and by the above-mentioned lawsuit." Thus, the agreement expressly preserved both the statutory claim under the Act and the takings claims set forth in plaintiff's statutory protest and in his lawsuit.[4]

Although for the most part procedural in nature, the Act also embodies a statutory standard against which monetary exactions by local governments subject to its provisions are measured. Government Code section 66001 requires the local agency to determine "how there is a *reasonable relationship*" between the proposed use of a given exaction and both "the type of development project" and "the need for the public facility and the type of development project on which the fee is imposed." (Gov. Code, § 66001, subd. (a)(3), (4), italics added.) In addition, the local agency must determine how there is a "*reasonable relationship*" between "the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." (*Id.*, § 66001, subd. (b), italics added.)

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[4] In its brief on the merits, the city has raised two additional issues. It asserts that plaintiff preserved *only* his right to challenge the exactions under the Act. This argument was not raised below or in a counter-petition for review; it is therefore not cognizable before this court. (Cal. Rules of Court, rule 29(b)(1).) Furthermore, it is factually inaccurate. The city also asserts that the takings challenge is somehow not "ripe" because plaintiff waived all but his statutory challenge to the fees. The argument was not raised below and is therefore not cognizable before this court. Moreover, as noted above, it is also factually untenable.

The Act thus codifies, as the statutory standard applicable by definition to nonpossessory monetary exactions, the "reasonable relationship" standard employed in California and elsewhere to measure the validity of required dedications of land (or fees imposed in lieu of such dedications) that are challenged under the Fifth and Fourteenth Amendments. (See, e.g., *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31; *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633; *Grupe v. California Coastal Commission* (1985) 166 Cal.App.3d 148; cf. *Nollan, supra,* 483 U.S. at pp. 839-840; *Dolan, supra,* 512 U.S. at p. ___ [114 S.Ct. at p. 2319] ["Some form of the reasonable relationship test has been adopted in many . . . jurisdictions."].)

As we explain, the high court's opinions in *Nollan* and *Dolan* cast substantial doubt on the sufficiency of the *Associated Homebuilders* standard, at least as applied to cases such as this one, where the property owner challenges an individualized exaction imposed as a condition of issuance of a development permit as an uncompensated taking under the Fifth Amendment. The high court's recent takings jurisprudence, as we comprehend it, underlines the separate nature of the takings clause as an independent constitutional guarantee, one that is not only distinct from the commands of the due process and equal protection provisions of the federal constitution, but which embodies a standard of judicial review that is greater than the "minimal level of scrutiny" mandated by those provisions. (*Dolan, supra,* 512 U.S. ___ [114 S.Ct. at p. 2319].)

We do not believe, however, that these conceptual obscurities need cause problems in practice. Although the

Mitigation Fee Act predates the formulation adopted by the high court in *Dolan*, we believe the Act's "reasonable relationship" language should be construed in light of *Dolan's* "rough proportionality" test for two reasons. First, the statutory scheme authorizes "*any party* on whom a fee, tax, assessment, dedication, reservation, or *other exaction* has been imposed, the payment or performance of which is required to obtain governmental approval of a development," to protest such an imposition by following the procedures provided in section 66020 of the Act. (Gov. Code, § 66021, subd. (a), italics added.) Such a broadly formulated and unqualified authorization is consistent with the view that the Legislature intended to require *all* protests to a development fee that challenge the sufficiency of its relationship to the effects attributable to a development project – regardless of the legal underpinnings of the protest – to be channeled through the administrative procedures mandated by the Act. Such claims would encompass not only statutory grounds, but contentions that a given imposition offends the commands of the takings clause of the Fifth Amendment. Requiring that constitutionally-based claims be determined under the provisions of the Act does not itself raise a constitutional issue "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,'. . . . " (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13, quoting *Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 194-195.) This is so because the Fifth Amendment "leaves to the state . . . the procedures by which compensation must be sought." (*Ibid.*)

Second, because the Legislature incorporated into subdivision (a)(3) of the Act a standard that generally corresponds to the one reflected in the high court's takings jurisprudence (see *Dolan, supra,* 512 U.S. at p. ___ [114 S.Ct. at p. 2319] ["We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm. . . . We do not adopt it as such, partly because the term . . . seems confusingly similar to the term 'rational basis'. . . . "]), it is appropriate for this court to interpret the statutory standard in a manner consistent with the high court's decisions in *Nollan* and *Dolan* so that a development fee imposed pursuant to the act, and that satisfies its requirements, will not be subject to challenge on constitutional grounds. By interpreting the "reasonable relationship" standard adopted by Government Code section 66001 as imposing a requirement consistent with the *Nollan/Dolan* standard, we serve the legislative purpose of protecting developers from disproportionate and excessive fees, and carry out the legislative intent of imposing a statutory relationship between monetary exaction and development project that accurately reflects the prevailing takings clause standard.[5]

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[5] Contrary to the assertion of Justice Kennard that "[t]his case was litigated under the Takings Clause, not our state's Mitigation Fee Act; thus, there is no need to construe the Mitigation Fee Act to decide this case," (con. & dis. opn. of Kennard, J., at p. 2), plaintiff complied with the requirements of the Act by asserting both statutory *and* the constitutional takings claims in his protest. (See fn. 4, *ante,* at p. 9.) We resolve plaintiff's claim in the context of the Act for the reasons set forth in the main text, that is, the unqualified statutory language channeling all protests to development fees through the

We must, in other words, recognize that in the wake of *Dolan* the term "reasonable relationship" embraces both constitutional and statutory meanings which, for all practical purposes, have merged *to the extent* that the *Dolan* decision applies to development fees – an issue we address below. Thus, developers who wish to challenge a development fee on either statutory or constitutional grounds must do so via the statutory framework provided by the Act. (Cf. *Hensler v. City of Glendale, supra,* 8 Cal.4th at pp. 13-15.)

III

"Leveraging" the Permit Power and the Takings Clause

Our account of the factual record should make it clear that we view this case as one presenting the earmarks of what has come to be characterized in recent takings jurisprudence as a form of regulatory "leveraging." We mean to convey by such a characterization what Justice Scalia appears to have had in mind when, describing the California Coastal Commission's exaction of a beachfront easement from a homeowner as a condition of issuing a development permit, he wrote in *Nollan, supra,* 483 U.S. 825, that "One would expect that a [permit] regime in which this kind of *leveraging* [i.e., the imposition of *unrelated* exactions as a condition for granting permit approval] of the police power is allowed would produce stringent land-use regulation which the State

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procedures prescribed by the Act and the formulaic identity of the statutory and constitutional standards.

then waives to accomplish other purposes. . . . " (*Id.* at p. 837, fn. 5, italics added.)

In our view, the intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just such indicators in land use "bargains" between property owners and regulatory bodies – those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context – where the individual property owner-developer seeks to negotiate approval of a planned development – that the combined *Nollan* and *Dolan* test quintessentially applies. Its effect, at least as to those conditions that fail to exhibit the constitutionally required nexus, is to rule out the imposition of a certain species of regulatory conditions: those which are either logically unrelated to legitimate regulatory objectives or fail to exhibit the constitutionally required "fit" between conditional means and legitimate governmental ends.

Where the local permit authority seeks to justify a given exaction as an alternative to denying a proposed use, *Nollan* requires a reviewing court to scrutinize the instrumental efficacy of the permit condition in order to determine whether it logically furthers the *same* regulatory goal as would outright denial of a development permit. A court must also, under the standard formulated in *Dolan*, determine whether the factual findings made by the permitting body support the condition as one that is more or less proportional, in both nature and scope, to the public impact of the proposed development.

Thus, although we conclude that the combined test of *Nollan* and *Dolan* applies to the *monetary* exaction imposed by Culver City in this case, we also conclude that the heightened standard of scrutiny is triggered by a relatively narrow class of land use cases – those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation. Neither *Nollan* nor *Dolan* are, after all, conventional regulatory takings cases. Rather, as the court's rationale for its result in *Nollan* demonstrates, both are cases in which the local government attached a condition to the issuance of a development permit which, *but for* the claim that the exaction is justified by the greater power to deny a permit altogether, would have amounted to an uncompensated requisition of private property.

As Justice Scalia's opinion in *Nollan, supra,* 483 U.S. 825, makes clear, such a discretionary context presents an inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation. In such a context, the heightened *Nollan-Dolan* standard of scrutiny works to dispel such concerns by assuring a constitutionally sufficient link between ends and means. It is the imposition of land use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.

The remainder of our opinion seeks to demonstrate the accuracy of these conclusions, which we then apply to the record before us in this case.[6]

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[6] Scholarly comment on the two cases is almost unmanageably large. (See, e.g., Kmiec, *At Last, The Supreme Court Solves the Takings Puzzle* (1995) 19 Harv. J. L. & Pub. Poly. 147; Kendall & Ryan, *"Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan* (1995) 81 Va. L. Rev. 1801; Funk, *Reading Dolan v. City of Tigard* (1995) 25 Envtl. L. 127; Huffman, *Dolan v. City of Tigard: Another Step in the Right Direction* (1995) 25 Envtl. L. at p. 143; Kushner, *Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court* (1992) 8 J. Land Use & Envtl. L. 53; Been, *'Exit' as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine* (1991) 91 Colum. L. Rev. 473; Morosoff, *Take My Beach Please!: Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions* (1989) 69 B. U. L. Rev. 823; Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse* (1988) 88 Colum. L. Rev. 1630; Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission* (1988) 12 Harv. Envtl. L. Rev. 231; Epstein, *The Supreme Court – Forward* (1988) 102 Harv. L. Rev. 1, 58; Michelman, *Takings, 1987* (1988) 88 Colum. L. Rev. 1600; Epstein, *Descent and Resurrection* (1987) 1987 Sup. Ct. L. Rev. 1; Karlin, *Back to the Future: From Nollan to Lochner* (1988) 17 Sw.U.L. Rev. 627; Peterson, *Land Use Regulatory 'Takings' Revisited: The New Supreme Court Approaches* (1988) 39 Hastings L. J. 335; Falik & Shimko, *The "Takings" Nexus – The Supreme Court Chooses a New Direction In Land-Use Planning: A View From California* (1988) 39 Hastings L. J. 359; Note: *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission* (1988) 102 Harv. L. Rev. 448; *The Supreme Court – Leading Cases* (1988) 101 Harv. L. Rev. 119, 240.)

A

Nollan and the "Essential Nexus" Standard

In *Nollan, supra,* 483 U.S. 825, residential property owners challenged a requirement of the California Coastal Commission that they grant a lateral easement for public access across the back (or sea side) of their beachfront property as a condition for approval of a building permit to construct a larger beach house. The issue, as the high court framed it, was not whether the permit condition would have deprived the Nollans of all economically viable use of their property (it would not have), but rather whether the exaction furthered a legitimate state interest. The Coastal Commission argued that the easement condition was necessary to foster "visual access" to the beach and to overcome the "psychological barrier" to its use created by shorefront development. (483 U.S. at p. 835.)

The Supreme Court assumed that the purposes advanced by the Coastal Commission represented legitimate state interests and were, at least in the abstract, constitutionally inoffensive. (483 U.S. at pp. 835-836.) The court explained, however, that "[t]he evident constitutional propriety disappears . . . if the [permit] condition . . . utterly fails to further the end advanced as the justification for the prohibition." (*Id.* at p. 837.) When "that *essential nexus* is eliminated," the court observed, the legitimacy of the exaction is undermined and it "becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." (*Ibid.*, italics added.) Applying the newly minted "essential nexus" standard, the

court found the required relationship between the Nollans' permit condition and the asserted state interest to be absent. The permit condition was an easement for *lateral* access to allow visitors to traverse the Nollans' property while passing from one beach to another. The court found it "quite impossible to understand" how such an easement furthered the "visual access" or lowered the "psychological barriers" of people *already* on the beach. (*Id.* at p. 838.) It was this absence of a link between the permit condition and the Commission's purported public purpose for requiring it that made the exaction a taking. (*Id.* at pp. 841-842.)[7]

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[7] The *Nollan* majority also made clear that the standard for evaluating a takings claim differs from that applied to a due process challenge. The latter, the majority explained, requires merely that the State "could rationally have decided" that the land use regulation adopted could achieve its objective, and thus invokes only a minimal level of judicial review. (483 U.S. at p. 834, fn. 3, italics omitted.) To survive a takings claim, however, the court stressed that the regulation must "substantially advance" a legitimate state interest. (*Ibid.*) Thus, the *Nolan* [sic] majority consciously embraced what Justice Brennan had critically characterized as a more "demanding standard" (483 U.S. at p. 848 (dis. opn. of Brennan, J.)) requiring a more "precise fit between the forms of burden and [the permit] condition. . . . " than had previously been demanded for purposes of due process. (*Id.* at p. 847.)

In a particularly expressive rejoinder to Justice Brennan, the *Nollan* majority rejected the argument that the easement condition represented a reasonable "exchange" in return for the "benefit" of the development permit, declaring that "the right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit.' " (483 U.S. at pp. 833-834, fn. 2.)

B

Dolan and the "Rough Proportionality" Standard

The "essential nexus" test announced in *Nollan* has recently been applied and extended by the high court in *Dolan, supra,* 512 U.S. ___ [114 S.Ct. 2309]. The facts and the holding in Dolan demand our particular attention in view of the court's subsequent grant of certiorari in this case and its order directing the Court of Appeal to reexamine its prior judgment in light of the *Dolan* opinion. The facts were fairly straightforward. The plaintiff, Mrs. Dolan, owned a chain of plumbing and electrical supply stores, one of which – located in the City of Tigard, a Portland, Oregon suburb – she sought to expand by constructing a new building on the existing parcel, nearly doubling the retail sales space. The city had conditioned approval of the necessary building permit on dedications of a portion of the parcel for flood control and traffic improvements. Invoking its local development code, the city had required Mrs. Dolan to dedicate a percentage of the parcel adjacent to a floodplain as part of the city's "Greenway" system to prevent additional stress on its storm drainage system. (*Id.* at p. ___ [114 S.Ct. at p. 2314].) To relieve traffic congestion in the downtown area, the city had also required the dedication of an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. (*Ibid.*)

The city had made generalized findings concerning the relationship between its dedication conditions and the projected impacts of Mrs. Dolan's project. As to the pedestrian pathway, the city's planning commission had found it was " '*reasonable to assume* that customers and

employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs.' " (512 U.S. at p. ___ [114 S.Ct. at p. 2314]; italics added.) As for the drainage system dedication, the planning commission found that the " 'anticipated increased storm water flow from the subject property to an already strained creek and drainage basin *can only add* to the public need to manage the stream channel and floodplain for drainage purposes.' " (*Id.* at p. ___ [sic] 114 S.Ct. at p. 2315], italics added.) The Oregon state courts upheld the city's permit conditions, rejecting Mrs. Dolan's argument that the dedication requirements were an uncompensated taking of her property because they were not sufficiently related to her proposed development project.

The United States Supreme Court reversed, establishing in its opinion a two-step procedure for analyzing so-called regulatory takings claims that builds on the holding in *Nollan, supra,* 483 U.S. 825. First, as it had explained in *Nollan,* a court confronted with a property owner's claim that conditions imposed by a local government for issuance of a development permit must "determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city." (*Dolan, supra,* 512 U.S. at p. ___ [114 S.Ct. at p. 2317], quoting *Nollan, supra,* 483 U.S. at p. 837.) If the court finds the presence of such a nexus, it "must then decide the required *degree* of connection between the exactions and the projected impact of the proposed development." (*Ibid.*, italics added.)

In elaborating upon this latter requirement – one that had not appeared in the formulation adopted by the court

in *Nollan* – the Chief Justice's opinion observed that *state* courts "have been dealing with this problem a good deal longer than we have" and typically apply one of three standards. (512 U.S. at p. ___ [114 S.Ct. at p. 2318].) "In some States," the court noted, "very generalized statements as to the necessary connections between the required dedication and the proposed development seem to suffice." (*Ibid.*) The high court rejected this "deferential" standard as "too lax" to adequately protect a landowner's right to just compensation if her property is taken for a public purpose. (*Dolan, supra,* 512 U.S. at p. ___ [114 S.Ct. at p. 2319].)

Other state courts have required a very strict correspondence between the exaction and the development, described as the "specifically and uniquely attributable test." Under this standard, the local government must demonstrate that the exaction is precisely proportional to a burden directly and specifically created by the development; otherwise, the regulation becomes, in the words of the Illinois Supreme Court, "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." (*Pioneer Trust & S. Bank v. Village of Mount Prospect* (Ill. 1961) 176 N.E.2d 799, 802.) The high court also rejected this test, as one requiring a more exacting standard of scrutiny than the federal Constitution demands. (*Dolan, supra,* 512 U.S. at p. ___ [114 S.Ct. at p. 2319].)

Still other states have adopted what the *Dolan* court characterized as an "intermediate position," requiring the municipality to show a "reasonable relationship" between the required exaction and the impact of the proposed development. Typical of these, according to the

court, is *Simpson v. City of North Platte* (Neb. 1980) 292 N.W.2d 297, in which the Nebraska Supreme Court observed that the distinction between a proper exercise of the police power and an improper exercise of eminent domain turned on whether there was "some reasonable relationship or nexus to the use to which the property is being made or is merely being *used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.*" (*Id.* at p. 301, italics added.) A city may not, the Nebraska high court held, impose an exaction for some future public use as a condition of permit approval when such future use is not "*occasioned* by the construction sought to be permitted." (*Id.* at p. 302, italics added.)

The *Dolan* court concluded that the "reasonable relationship" test was the closest to the federal constitutional norm; it declined, however, to adopt the "reasonable relationship" terminology because of the potential for confusion with the *less stringent* "rational basis" standard describing "the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." (512 U.S. at p. ___ [114 S.Ct. at p. 2319].) Instead, the court adopted the term "rough proportionality," explaining that such a formulation entails "some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." (*Id.* at p. ___ [114 S.Ct. at pp. 2319-2320], italics added, fn. omitted.) Although, as the court explained, no "precise mathematical calculation is required," the city must nevertheless "make some effort to quantify its findings in support of the dedication" beyond mere conclusory statements that it will mitigate

or offset some anticipated burden created by the project. (*Id.* [114 S.Ct. at p. 2322].)

Applying these principles to the facts before it, the *Dolan* court concluded that the city's required dedications to its "Greenway" system and the pedestrian pathway were not "reasonably related" to Mrs. Dolan's proposed development project. Chief Justice Rehnquist's opinion for the majority conceded that keeping portions of the floodplain adjacent to the petitioner's property free of development could *logically* mitigate pressures on the city's sewage system. However, the court observed, "the city demanded more – it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along [the] Creek for its Greenway system." (512 U.S. at p. ___ [114 S.Ct. at p. 2320].) Yet nothing in the city's findings explained "why a *public* greenway, as opposed to a private one, was required in the interest of flood control." (*Ibid.*, italics added.) The court thus found it "difficult to see" how public access to petitioner's floodplain easement was "sufficiently related to the city's [admittedly] legitimate interest in reducing flooding problems along [the] Creek, and the city has not attempted to make any individualized determination to support this part of its request." (*Id.* at pp. ___ [114 S.Ct. at pp. 2320-2321].) Hence, the court held, "the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building." (*Id.* at p. ___ [114 S.Ct. at p. 2321].)

As for the proposed pedestrian pathway dedication, the court likewise acknowledged that the property owner's development might lead to increased traffic in

the downtown streets. Nevertheless, it concluded the city had not demonstrated that the additional traffic generated by the development "reasonably relate[s] to the city's requirement for a dedication of the pedestrian/bicycle pathway easement." (114 S.Ct. at p. 2321.) The city had merely found that the creation of the pathway " '*could* offset some of the traffic demand . . . and lessen the increase in traffic congestion [sic]' " (*Id.* at pp. ___ [114 S.Ct. at pp. 2321-2322], italics added, fn. omitted.) The fact that the pathway "could" have had such an effect, however, was insufficiently precise to demonstrate the constitutionally required relationship between the development and the compelled property dedication. "[T]he city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway," the court wrote, "beyond the conclusory statement that it could offset some of the traffic demand generated." (*Id.* at p. ___ [114 S.Ct. at p. 2322].) Concluding that "the findings upon which the city relies do not show the required reasonable relationship," the court ordered the case remanded for further proceedings. (*Id.* at pp. ___ [114 S.Ct. at pp. 2321, 2322].)

IV

Do Nollan and Dolan Apply to Nonpossessory Exactions?

Both *Nollan* and *Dolan* involved regulatory schemes under which the local government had required the *possessory dedication* of real property by the owner as a condition for issuing the necessary development permit. Moreover, language employed by Justice Scalia in his opinion for the majority in *Nollan* has been read by some

students of the high court's contemporary takings jurisprudence as *limiting* the operation of the "essential nexus" requirement to cases of possessory exactions. After observing that the high court's modern takings cases had upheld land use restrictions that "substantially advance" a legitimate state purpose (see, e.g,. [sic] *Agins v. Tiburon* (1981) 447 U.S. 255), Justice Scalia wrote that "We are inclined to be particularly careful about the adjective [i.e., *'substantial'*] where the *actual conveyance* of property is made a condition for the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." (483 U.S. at p. 841, italics added.)

This case, of course, does not involve a demand by Culver City that the property owner convey a portion of the parcel for public use as a condition of granting his rezoning request and issuing a permit to build the desired condominium project. Rather, the city insists on a *different* kind of exaction as a condition for authorizing development: the payment of $280,000. Does this distinction in the nature of the exaction make the diptych of *Nollan* and *Dolan* inapplicable to this case? Some courts and commentators have concluded that it does.

In *Blue Jeans Equities West, Inc. v. City and County of San Francisco* (1992) 3 Cal.App.4th 164, for example, our Court of Appeal concluded that "any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings cases." (*Id.* at p. 171.) The Court of Appeal relied in part on the opinion by the United States Court of Appeals for the Ninth Circuit in *Commercial Builders v. Sacramento* (9th Cir. 1991) 941 F.2d 872.

There, a divided court had rejected a contention by commercial developers challenging a city ordinance conditioning nonresidential building permits on payment of a fee to offset municipal burdens associated with the influx of low income workers, relocating to fill jobs created by such projects, that *Nollan* imposed a heightened level of scrutiny on such fee exactions. Relying on other federal appellate court opinions that had "considered the constitutionality of ordinances that placed burdens on land use after *Nollan*," the majority concluded that "[n]one have interpreted that case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land." (*Id.* at p. 874, citing *St. Bartholomew's Church v. City of New York* (2d Cir. 1990) 914 F.2d 348, 357, fn. 6, cert. den. *sub nom. Committee to Oppose Sale of St. Bartholomew's Church v. Rector* (1991) ___ U.S. ___ [111 S.Ct. 1103]; *Adolph v. Federal Emergency Management Agency* (5th Cir. 1988) 854 F.2d 732, 737; *Naegele Outdoor Advertising, Inc. v. City of Durham* (4th Cir. 1988) 844 F.2d 172, 178; see also *Leroy Land Development v. Tahoe Regional Planning Agency* (9th Cir. 1991) 939 F.2d 696.) "As a threshold matter," the Ninth Circuit concluded, "we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply" to the Sacramento ordinance at issue. (941 F.2d at p. 874; see also Kushner, *Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court, supra*, 8 J. Land Use & Envtl.L. 53, 166.)

There is no question that the takings clause is specially protective of property against *physical occupation* or invasion – a proposition that the court's opinion in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419,

makes clear. It is also true, as the city points out, that government generally has greater leeway with respect to noninvasive forms of land use regulation, where the courts have for the most part given greater deference to its power to impose broadly applicable fees, whether in the form of taxes, assessments, user or development fees. Both *Blue Jean Equities West v. City and County of San Francisco, supra,* 3 Cal.App.4th 164, and *Commercial Builders v. Sacramento, supra,* 941 F.2d 872, dealt with such legislatively formulated development assessments imposed on a broad class of property owners. Fees of this nature may indeed be subject to a lesser standard of judicial scrutiny than that formulated by the court in *Nollan* and *Dolan* because the heightened risk of the "extortionate" use of the police power to exact unconstitutional conditions is not present. Nonetheless, we reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed – as in this case – neither generally nor ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered.

One of the central promises of the takings clause is that truly public burdens will be publicly borne. Where the regulatory land use power of local government is deployed against individual property owners through the use of conditional permit exactions, the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposing conditions that lack any logical affinity to the public impact of a particular land use. The essential nexus test is, in short, a "means-ends" equation,

intended to limit the government's bargaining mobility in imposing permit conditions on individual property owners – whether they consist of possessory dedications or the exaction of cash payments – that, because they appear to lack any evident connection to the public impact of the proposed land use, *may* conceal an illegitimate demand; may, in other words, amount to " 'out-and-out . . . extortion.' " (*Nollan, supra,* 483 U.S. at p. 837.)

Under this view of the constitutional role of the consolidated "essential nexus" and "rough proportionality" tests, it matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction. In a context in which the constraints imposed by legislative and political processes are absent or substantially reduced, the risk of too elastic or diluted a takings standard – the vice of distributive injustice in the allocation of civic costs – is heightened in either case. Support for this view of the scope of the test can be drawn from a close reading of the text of Justice Scalia's opinion in *Nollan* and from the Chief Justice's opinion in *Dolan*.

A

The *Nollan* opinion begins its substantive analysis of the takings claim with the proposition that "[h]ad California simply required the Nolans [sic] to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach . . . we have no doubt there would have been a

taking." (483 U.S. at p. 831.) Assuming the state's unilateral and uncompensated requisition of a lateral easement from the Nollans would have offended the takings clause, the court then asked "whether requiring [an easement] to be conveyed as a condition for issuing a land-use permit alters the outcome." (*Id.* at p. 834.) The answer to that question, the court said, was "yes." The imposition of a permit condition that "serves the same legitimate police-power purposes as a refusal to issue the permit," the high court reasoned, "should not be found to be a taking *if the refusal to issue the permit would not constitute a taking.*" (*Id.* at p. 836, italics added.) "Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithsfanding construction of the new house . . . so long as the Commission could have exercised its police power . . . to forbid construction of the house altogether, imposition of the condition would also be constitutional." (*Ibid.*)

The heart of the takings analysis, Justice Scalia's opinion continued, lay in the presence (or absence) of a *link* between the commission's power to deny the Nollans a development permit altogether, and its power to impose a condition on its issuance that furthers the *same end* as an outright prohibition on development. "If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition *which accomplishes the same purpose is not.*" (483 U.S. at pp. 836-837, italics added.)

The vice of the commission's permit condition in *Nollan*, however, was the *absence* of any logical connection between the condition and the purported justification for an outright ban on development. "The evident constitutional propriety" – between denying a permit and conditioning its issuance on achieving the same purpose through alternative means – "disappears," the court wrote, "if the condition substituted for the prohibition utterly *fails to further the end advanced as the justification for the prohibition*. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. . . . [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." (483 U.S. at p. 837, italics added.)

"In short," Justice Scalia concluded, "unless the permit condition *serves the same governmental purpose* as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " (483 U.S. at p. 837, quoting *J.E.D. Associates v. Atkinson (1981)* 432 A.2d 12, 14-15, italics added.)[8]

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[8] Justice Scalia, the author of the majority opinion in *Nollan, supra*, 483 U.S. 825, elaborated on his view of the essence of the Takings Clause in his dissent in *Pennell v. City of San Jose* (1988) 485 U.S. 1, 15, a case challenging a rent control ordinance on the ground that one of its criteria for increases – whether a proposed hike would work a hardship to a tenant – constituted

In briefing before this court, plaintiff and several supporting amici curiae insist that because the club was a *privately* operated facility, accessible only by dues-paying members, a zoning change withdrawing the parcel from such private recreational use could not have a cognizable *public* impact as a matter of law. The trial court, in its memorandum opinion granting judgment for plaintiff, adopted this argument, reasoning that "[Plaintiff's] club . . . was at all times *private* property; the city never owned any interest in it nor was any part of it ever dedicated to *public* use. . . . [plaintiff's] actions cannot be said to deprive the *City* of tennis courts, because neither did [plaintiff] have an affirmative duty to provide tennis courts to the City or its residents nor would tennis courts necessarily be available to the City but for [plaintiff's] project. . . . [¶] The City could have condemned a portion of [plaintiff's] property for use as City tennis courts, but the City would then of course have had to pay for the land. Here, instead of taking land for which it would

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an uncompensated taking. Although a majority held the takings claim premature, Justice Scalia would have held "that the . . . provision . . . effects a taking of private property without just compensation. . . . " (*Ibid.*) Invoking the language of *Armstrong v. United States* (1960) 364 U.S. 40, 49, his dissent reasoned that "[t]raditional land-use regulation . . . does not violate" the principle embodied in *Armstrong* "because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy." (485 U.S. at p. 20 (dis. opn. of Scalia, J.) The essence of the takings clause, the dissent reasoned, "is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation." (*Id.* at p. 23; cf. *Nollan, supra*, 483 U.S. at p. 825, fn. 4.)

have had to pay, the City proposes to take not land but money. This is equally impermissible."

The assumption that, because property is designated for private recreational use, it lacks public value and that its subsequent withdrawal has no public impact is flawed as a matter of logic. Although privately owned and operated, plaintiff's health club was a business establishment, accessible to the public on the payment of a membership fee. The opportunity of Culver City residents to use such private recreational facilities created a *public* benefit by enlarging the availability of such facilities. Without such a facility, residents would have to travel farther, wait longer, and put up with other inconveniences and restricted choices in their recreational pursuits. Thus, the fact that a recreational facility is privately rather than publicly owned does not erase its value to the public.

This principle – that the discontinuation of a private land use may have distinctly *public* consequences – is well accepted in land use law. Indeed, in *Nollan* itself Justice Scalia as much as conceded that the loss of private open space resulting from residential beach development could lead to an adverse public impact – a diminution of coastal views – justifying a requirement that the Nollans "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." (483 U.S. at p. 836.) Although, as we explain below, the fact that a recreational facility is privately rather than publicly owned may affect the magnitude of the value the city may constitutionally place on its loss, private status alone does not per se erase its intrinsic public value for land use regulatory purposes. In short, it is well accepted in both the case and statutory law that the discontinuance

of a private land use can have a significant impact justifying a monetary exaction to alleviate it. We perceive no reason why the same cannot be said of the loss of land devoted to private recreational use through its withdrawal from such a use as a result of being "up zoned" to accommodate incompatible uses.

There thus exists a potential basis *in logic* for a connection between a social need generated by plaintiff's condominium project and the $280,000 mitigation fee imposed by the city.

B

The opinion by the Chief Justice in *Dolan, supra,* 512 U.S. [114 S.Ct. 2309], both incorporates the essential nexus test of *Nollan,* and takes the next analytical step – determining the extent to which the takings clause imposes not only a logical connection between a permit condition and the public impact of a given land use, but dictates the nature of the required "fit" between means and ends. While the court in *Nollan* was concerned with the *nature* of the relationship between a proposed development and a governmental exaction, its focus in *Dolan* is on the *degree* of the required connection. Instead of asking "what is the nature of the relationship between a given permit condition and the public costs of a proposed land use" (a question answered in *Nollan* by the "essential nexus" formulation), the court asked in *Dolan* "[W]hat is the required *degree of connection* between the exactions imposed by the city and the projected impact[ ] of the proposed development?" (*Id.* at p. ___ [114 S.Ct. at p. 2312], italics added.)

The answer to that question, as we have seen, is twofold. The condition imposed by the challenged regulation must not only be roughly proportional, the *Dolan* court held, both in "nature and extent to the impact of the proposed development" (512 U.S. at p. ___ [114 S.Ct. at p. 2320]), but the required proportionality must be demonstrated by "some sort of individualized determination." (*Id.* at p. ___ [114 S.Ct. at p. 2319].) The court framed the first leg of its rough proportionality test as an inquiry into "whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development." (*Id.* at p. 2318.) The antecedent question underlying *that* inquiry is, of course, the exact nature of the "required relationship" imposed by the takings clause. As we have seen, the court answered its own question by applying an "intermediate" level of constitutional scrutiny – "rough proportionality" – to the relationship between the city's permit conditions and the public costs associated with Mrs. Dolan's proposed development.

We need not repeat here the extended account of the *Dolan* court's reasoning set out above (*ante*, at pp. 16-20), except to note that, as we read the high court's opinion, the chief analytical advance of *Dolan* over the formulation by the court in *Nollan* appears to lie in the requirement that the local permit authority "make some sort of *individualized* determination that the required dedication is related both in nature and extent to the impact of the proposed development." (512 U.S. at pp. ___ [114 S.Ct. at pp. 2319-2320], italics added, fn. omitted.) We view the requirement that the local government demonstrate a *factually* sustainable proportionality between the effects

of a proposed land use and a given exaction as one which furthers the assurances implicit in the *Nollan* test that the condition at issue is more than theoretically or even plausibly related to legitimate regulatory ends.

Nollan and *Dolan* are thus concerned with implementing one of the fundamental principles of modern takings jurisprudence – "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States, supra,* 364 U.S. at p. 49.) Of course, as we have already observed, is it not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a *generally* applicable development fee or assessment – cases in which the courts have deferred to legislative and political processes to formulate "public program[s] adjusting the benefits and burdens of economic life to promote the common good." (*Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124.) But when a local government imposes special, discretionary permit conditions on development by individual property owners – as in the case of the recreational fee at issue in this case – *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard.

V

Applying the Heightened Standard in This Case

We come, then, to the application of the combined *Nollan-Dolan* "essential nexus" and "rough proportionality" test to the facts in the record before us. Like the

high court in *Dolan, supra*, 512 U.S. ___ [114 S.Ct. 2309], we will conclude that, although the city's findings with respect to the relationship between the monetary exaction and the withdrawal of a parcel of land within Culver City restrictively zoned for private recreational use satisfies the essential nexus standard, the present record is inadequate to support the requirement that plaintiff pay a recreational fee of $280,000 for the desired permit. We conclude instead that although the city may be able to justify a monetary exaction in *some* amount, what that figure is we are quite unable to say on this record.

A

The land use limitation on which the city relies to justify its $280,000 fee exaction consists of a restriction of plaintiff's use of his property to commercial recreational activities, a restriction that could not be changed without amending both Culver City's general plan and the specific plan applicable to the parcel. It is well settled that such a limitation on use is constitutional unless the restriction "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." (*Agins v. City of Tiburon, supra*, 447 U.S. at p. 260.)

The general purpose of zoning and planning is to regulate the use of land to promote the public welfare, a power the courts have construed very broadly. Indeed, one of the traditional uses of the police power lies in providing citizens adequate recreational opportunities. (See, e.g., *Associated Home Builders etc., Inc. v. City of Walnut Creek, supra*, 4 Cal.3d 633, 638 (*Associated Homebuilders*)

["The elimination of open space in California is a melancholy aspect of the unprecedented population increase which has characterized our state in the last few decades. . . . [G]overnmental entities have the responsibility to provide park and recreation land to accommodate this human expansion. . . . "].) We thus have no doubt that the use of zoning to facilitate the availability of private recreational facilities to the residents of Culver City is within the scope of the city's police power.

Nor is it an unreasonable use of the police power for the city to prescribe not only broad categories of land use, such as "commercial" and "residential," but to specify, through a general plan, specific plan, and zoning regulations, the types of businesses that can be carried on at a given site, so long, of course, as the restrictions meet the two part standard embodied in *Agins v. City of Tiburon, supra,* 447 U.S. 255. The record before us indicates that private recreational facilities were in scarce supply in the city and merited preservation and promotion. As the 1988 city staff analysis of plaintiff's proposed project noted, "Culver City as a fully-developed urban city has very little open space in which to develop parks and related recreational facilities. By national standards . . . the City is deficient in park space, tennis courts, swimming facilities, gymnasiums and the recreational activity centers needed to maintain and enhance the 'quality of life' in our community."

We thus have no doubt as to the city's legitimate authority to impose development impact fees for park and recreational purposes. (See *Walnut Creek, supra,* 4 Cal.3d 633; Gov.Code, §§ 66001, 66477.) Nor is there any genuine dispute that the $280,000 fee, which the city has

committed to the purchase of additional recreational facilities, will substantially advance its legitimate interest in correcting a demonstrated deficiency in municipal recreational resources. Unlike *Nollan*, where the high court found no logical connection between the commission's demand for a lateral easement across the owner's property and the purported governmental purpose of enhancing visual access, the "essential nexus" in this case is plain.

B

We must next decide whether there is a "rough proportionality" between the public impact of the land use change and the recreational fee. The *Dolan* court, in an effort to balance the government's legitimate need to impose reasonable exactions against the property owner's right to be free of undue burdens, formulated an intermediate standard of review and a corresponding evidentiary burden on local government. "[G]eneralized statements as to the necessary connection between the required dedication and the proposed development" are constitutionally insufficient, according to the court. (512 U.S. at p. ___ [114 S.Ct. at p. 2318].) As noted, however, the *Dolan* majority also rejected the claim that the government "demonstrate that its exaction is directly proportional to the specifically created need" as being more than the Fifth Amendment demands. (*Id.* at p. ___ [114 S.Ct. at p. 2319].)

In both *Nollan* and *Dolan*, the court conceded that the development project at issue would have negative effects that the city could mitigate using its police power. It

found insufficiently substantial, however, the connection between those effects and the required public dedications. Similarly, the record before us in this case is devoid of any individualized findings to support the required "fit" between the monetary exaction and the loss of a parcel zoned for commercial recreational use. The city argues that its $280,000 recreation fee is warranted as partial compensation for the loss of some $800,000 in recreational improvements that were formerly located on plaintiff's property. But in this case it is error to measure the lost recreational benefits by the lost value of plaintiff's health club. The loss which the city seeks to mitigate by levying the contested recreational fee is not the loss of any particular recreational facility, but the loss of property reserved for private recreational use.

The city appears to be arguing, implicitly, that if it had refused to change its general and specific plan designations, and insisted on a private recreational use of the land, a new recreational facility would have been resurrected on the site, one containing four tennis court [sic] or their equivalent. From this premise, the city asserts that the change in land use granted plaintiff has resulted in the "loss" of four tennis courts that would have been built had that land use change not been granted. Even if such a supposition could be proven, however, it would still not justify the $280,000 fee, because the cost of these new private tennis courts would have been paid for by the fees of the private club members and the courts would have been private, not open to all members of the public free of charge.

Thus, under the city's formula, the public would receive, ex gratia, $280,000 worth of recreational facilities

the cost of which it would otherwise have to finance through membership fees. Plaintiff is being asked to pay for something that should be paid for either by the public as a whole, or by a private entrepreneur in business for a profit. The city may not constitutionally measure the magnitude of its loss, or of the recreational exaction, by the value of facilities it had no right to appropriate without paying for.

This is not to say, however, that *some* type of recreational fee imposed by the city as a condition of the zoning and related changes cannot be justified. The amount of such a fee, however, must be tied more closely to the actual impact of the land use change the city granted plaintiff. Although we are unable to discern, on this record, the precise value or the economic cost of these impacts, several possibilities suggest themselves. One such possibility is likely to be the additional administrative expenses incurred in redesignating other property within Culver City for recreational use. The city's director of human services, who opposed the abandonment of a recreational use restriction on plaintiff's property, stated that to "permit this type of recreational development elsewhere would . . . involve arduous and costly rezoning and public hearings." It would be reasonable to require plaintiff to contribute toward defraying these anticipated rezoning costs, so that the city does not have to bear them itself or pass them along to future private developers seeking to construct recreational facilities.

More generally, the city's approval of plaintiff's condominium project may have given rise to public costs in

the form of a diminished ability to attract private recreational development. If the city can show that it would have to incur greater costs to attract a developer of suitable private recreational facilities because plaintiff's parcel is no longer reserved for such a recreational use, it may consider these costs to be a part of the impact of plaintiff's project, and would be constitutionally permitted to impose such an exaction. Such a fee would enable the city to induce private health club development by offering monetary incentives roughly proportional to the land use incentive it relinquished when it removed the recreational use restriction from plaintiff's property.

Of course, the city could not constitutionally require plaintiff to dedicate the same amount of land for *public* recreational facilities. It could, however, require plaintiff to transfer, so to speak, the restricted land use designation at the Overland site to a comparable parcel plaintiff owns within the city, thus returning the city to the status quo as it existed prior to approval of the condominium project, that is, with a similar parcel of vacant land reserved for recreational use as an inducement to the development of private recreational facilities. If the city decides, however, that such a restricted land use transfer is impracticable, it may surely levy an in-lieu exaction to accomplish the same objective. Such a fee would serve the same purpose as do all development fees: providing the city with a means of escaping the narrow choice between denying plaintiff his project permit altogether or subordinating legitimate public interests to plaintiff's development plans.

We cannot say, on this incomplete record, what if any recreational fee the evidence might justify. Although in

calculating its net cost as a result of upzoning the Overland Avenue parcel the city must take into account any relative benefit that plaintiff's project would contribute to the public interest for which the fee is imposed, the record suggests that some exaction may be warranted. It is thus appropriate to return the case to the city to reconsider its valuation of the fee in light of the principles we have articulated. Remand to the city was apparently what occurred in *Dolan* itself after the case was returned to the Oregon Supreme Court. (See *Dolan v. City of Tigard* (Or. 1994) 877 P.2d 1201 [the case is "remanded to the City of Tigard for further proceedings."].) Following remand, the city must determine whether and to what extent approval of plaintiff's requested land use changes justify the imposition of a recreation fee as a means of compensating it for the additional costs of attracting the development of comparable private recreational facilities for its residents. The determination of such a fee will, of course, require the city to make specific findings supported by substantial evidence – that is, the city "must make some effort to quantify its findings" supporting any fee, beyond "conclusory statements," although "[n]o precise mathematical calculation is required" either by the takings clause or the Act. (*Dolan, supra,* 512 U.S. at p. ___ [114 S.Ct. at p. 2322].)

VI

The Art in Public Places Fee

Under the city's Art in Public Places ordinance, plaintiff could not receive a certificate of occupancy for any of the 30 townhouses in the project until he either paid $32,200 to the city art fund (1 percent of the total

building valuation) or contributed an approved work of art of an equivalent value. Under the latter option, the art may either be placed on site, in which case it remains the property of the applicant, or it may be donated to the city for placement elsewhere. Although petitioner initially opted to pay the fee, his successor in interest subsequently placed art of his own choosing on the site and received the 30 certificates of occupancy during the pendency of this action.

Plaintiff contends that the required dedication of art or the cash equivalent thereof constitutes a taking under the *Nollan-Dolan* standards. This follows, he asserts, from the fact that the city made no individualized determination that the art mitigates a need generated by the project.

The city defends the art fee on several grounds. As a threshold matter, it contends plaintiff failed to preserve his right to litigate the claim because his successor satisfied the requirements of the ordinance and accepted the benefit of receiving all 30 certificates of occupancy during the pendency of these proceedings. The record shows, however, that plaintiff filed a written protest to the imposition of the fee in accordance with Government Code section 66020, and subsequently entered into an agreement with the city in which he preserved his right to maintain this "lawsuit" challenging both the recreation fee and the art fee. Thus, the claim has not been waived.

Nevertheless, we agree with the city that the Art in Public Places fee is not a development exaction of the kind subject to the *Nollan/Dolan* takings analysis. As both the trial court and the Court of Appeal concluded, the requirement to provide either art or a cash equivalent

thereof is more akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other *design* conditions such as color schemes, building materials and architectural amenities. Such aesthetic conditions have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property. (See, e.g., *Metromedia Inc. v. San Diego* (1980) 453 U.S. 490, 508, fn. 13 [approving prohibition against outdoor advertising]; *Penn Central Transportation Co. v. New York City, supra,* 438 U.S. 104 [upholding municipal power to preserve landmark structures]; *Agins v. City of Tiburon, supra,* 447 U.S. 255 [upholding condition to preserve scenic views].) The requirement of providing art in an area of the project reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the city to impose.

CONCLUSION

A generation ago, an observer of the high court's takings jurisprudence called the question of when land use regulation under the police power becomes compensable "the most haunting jurisprudential problem in the field of contemporary land-use law." (Harr, Land-Use Planning (3d ed. 1977) 766, quoted in *The Supreme Court – Leading Cases, supra,* 101 Harv.L.Rev. 119, 241.) After more than half a century during which the content of the takings clause lay comparatively unexamined – roughly between *Pennsylvania Coal v. Mahon* (1922) 260 U.S. 393, and *Penn Central Transportation Co. v. New York City, supra,*

438 U.S. 104 – the high court decided no less than eight such cases in a little more than a decade.[9] As several commentators have observed, the task of making this blitz of opinions doctrinally coherent is daunting; even the short-term direction of the court's recent takings jurisprudence remains uncertain. Perhaps *Nollan* and *Dolan* mark, as some scholars have suggested, "a major shift of the power of government in land use cases." (Epstein, *Takings: Descent and Resurrection, supra,* 1987 Sup.Ct.Rev. 1, 43); perhaps, as others have argued, they represent "a step backwards" from the heightened protection of property rights. (Note, *Taking a Step Back, supra,* 102 Harv.L.Rev. 448, 468.) Our own reading lies somewhere between these two margins.

The judgment of the Court of Appeal is reversed; the cause is remanded to that court with directions to order the case returned to the City of Culver City.

ARABIAN, J.*

WE CONCUR:
LUCAS, C.J.
GEORGE, J.

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* Hon. Armand Arabian, retired Associate Justice of the Supreme Court, assigned by the Chairperson of the Judicial Counsel.

[9] (*Penn Central Transportation Co. v. New York City, supra,* 438 U.S. 104; *Agins v. City of Tiburon* (1980) 447 U.S. 255; *Loretto v. Teleprompter Manhattan CATV Corp., supra,* 458 U.S. 419; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 476, 485 [sic] *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304; *Nollan, supra,* 483 U.S. 825; *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. ___, 112 S.Ct. 2886, 2893-2894; *Dolan, supra,* 512 U.S. ___ [114 S.Ct. 2309].)

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CONCURRING OPINION BY MOSK, J.

I concur in the plurality's judgment, and agree with much of its analysis. I fully agree with part V of the plurality opinion – that Culver City (the City) may be able to charge a fee for the loss of property designated for recreational use, but that it failed to employ the proper method of calculating such a fee. I agree, too, with part VI of the plurality opinion – that the art fee is constitutional. I write separately to address the larger question of the appropriate constitutional standard for reviewing monetary exactions on development. As I will elaborate below, the heightened standard of scrutiny found in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. ___ [114 S.Ct. 2309] (*Dolan*) is generally *not* applicable to development fees; the present case is thus more the exception than the rule. This view is consistent with the plurality's analysis, and our difference in this regard is more one of emphasis than of substance.

As explained below, nothing in the United States Supreme Court's recent takings jurisprudence can be understood to signify a change in the rule – founded on the fundamental principles of the separation of powers and judicial restraint – that state and local governments possess considerable authority to impose different and unequal financial burdens on property owners, subject only to the rational basis requirements of the Fourteenth Amendment's equal protection clause. Only when the government engages in the physical taking or invasion of real and personal property, or singles out individual

property owners by conditioning development permits on the payment of ad hoc fees not borne by a larger class of developers or property owners, does the heightened scrutiny of *Nollan* and *Dolan* apply.

I.

A. Physical Takings, Regulatory Takings, and the *Nollan/Dolan* Standard.

Nollan and *Dolan* must be viewed within the general framework of takings jurisprudence. One of the cornerstones of such jurisprudence is the special protection given to the *physical* invasion or occupation of real property under the Fifth Amendment. A government regulation that affects the use of land, such as a zoning ordinance, is generally not deemed to be a taking unless the regulation "does not substantially advance legitimate state interests [citations] or denies an owner economically viable use of his land [citation]." (*Agins v. Tiburon* (1980) 447 U.S. 255, 260.) In these cases, the burden rests with those challenging the regulation to demonstrate its unconstitutionality. (See *Dolan, supra*, 512 U.S. at p. ___, fn. 8 [114 S.Ct. at p. 2320, fn. 8].) However, "regulations that compel the property owner to suffer a physical 'invasion,' " will generally be determined to be takings *"no matter how minute the intrusion, and no matter how weighty the public purpose behind it . . . . "* (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 [112 S.Ct. 2886, 2892], italics added.)

The centrality of physical invasion in takings jurisprudence is nowhere more clearly stated than in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419

(*Loretto*). There the court invalidated a New York law requiring owners of apartment buildings to permit cable television companies to install cable wires and boxes on their premises. The court stated that it had "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but is also determinative." (*Id.* at p. 426.) As the court emphasized, "[a] landowner's right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " (*Id.* at p. 433.) In a permanent physical occupation of property "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." (*Id.* at p. 435.) The court therefore found the cable statute to be unconstitutional because of its requirement that landlords consent to the permanent occupation of their property, although the economic impact of this statute was far less onerous than a number of other regulations upheld by the court that restricted the use of property but did not authorize its physical invasion. (See, *e.g.*, *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104 [denial of permit to build a highrise for the sake of historical preservation]; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470 [regulation requiring coal mines to keep 50 percent of coal in the ground in order to prevent subsidence not a taking].)

Nollan must be considered as a further development of the principles enunciated in *Loretto*. In *Nollan*, the court considered a government regulation that permitted the physical invasion of property as a condition of granting a development permit. The Nollans sought to replace a dilapidated bungalow on property bordering the ocean, and were required to obtain a coastal development permit. As a condition of the permit, the Nollans would have been compelled to provide lateral public access along a portion of their property bounded by the ocean and their seawall, to enable members of the public to walk between two public beaches bordering the Nollans' property.

The court began its analysis by reaffirming the holding in *Loretto* that "[w]here governmental action results in '[a] permanent physical occupation' of the property, by the government itself or by others [citation], 'our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner . . . . ' " (*Nollan, supra,* 483 U.S. at pp. 831-832, quoting *Loretto, supra,* 458 U.S. at pp. 434-435.) The court continued: "We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." (*Nollan, supra,* 483 U.S. at p. 832.)

Given that view, it might be expected that the court would hold that the easement in *Nollan*, like the cable statute in *Loretto*, was a per se taking, for which the government must pay no matter what the justification.

But the court recognized that the regulation in the case before it, unlike the statute in Loretto, was imposed as a condition of approving a development application, and that a public agency could, if the proposed development contravened a valid land use regulation, deny that application altogether. "If a prohibition [to development] designed to accomplish [a lawful state] purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." (*Nollan, supra,* 483 U.S. at pp. 836-837.)

Thus, the otherwise unconstitutional imposition of a public easement on private property derives its constitutional legitimacy from the fact that a prohibition on development is constitutionally justified. "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification of the prohibition." (*Nollan, supra,* 483 U.S. at p. 837.) Without this "essential nexus," between the permit condition and the development ban, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " (*Ibid.*) The *Nollan* court found no such nexus in the case before it. The purported justification for limiting development – the interference of the newly constructed house with a public view of the ocean – was not served by a lateral easement allowing individuals to walk along the ocean. (*Id.* at pp. 838-839.)

That the *Nollan* case turned on the fact that the regulation was a physical taking is further accentuated by Justice Scalia at the conclusion of the majority opinion:

"We view the Fifth Amendment's Property Clause to be more than a pleading requirement . . . . [O]ur cases describe the condition for abridgment of property rights through the police power as a '*substantial* advanc [ing] of a legitimate state interest. We are inclined to be particularly careful about the adjective *where the actual conveyance of property* is made a condition to the lifting of a land-use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." (*Nollan, supra,* 483 U.S. at p. 841, second italics added.) Thus in *Nollan,* the rule that the government's physical occupation of private property is a per se taking is transformed, in the context of a development application, into a rule of heightened scrutiny to ensure that a required development dedication is not a mere pretext to obtain or otherwise physically invade property without just compensation.

In *Dolan,* the court considered the issue of how close the nexus between the development restriction and the dedication must be. In that case, Dolan sought the expansion of her hardware store. The court conceded that the city had legitimately found that the expansion would affect two valid government interests. First, the store expansion, adjacent to a floodplain, would increase the risk of flooding by paving over a greater surface area. Second, the expanded store would increase traffic congestion on nearby streets. The court also conceded that there was a nexus between those impacts and the development conditions in question – the dedication of an easement along the floodplain for a public greenway, and the dedication of an additional easement for a bicycle path.

(*Dolan, supra,* 512 U.S. at p. ___, [114 S.Ct. at p. 2314].) The court found, however, the nexus to be insufficient. There must be a "rough proportionality" between the development impact and the dedication, and a public agency "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Id.* at pp. ___-___, [114 S.Ct. at pp. 2319-2320], fn. omitted.)

The *Dolan* court, like the *Nollan* court, reiterated that its holding depended in part on the special protection that the takings clause affords against the physical occupation of private property by the government. The development conditions in *Dolan* "were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she *deed* portions of her property to the city. In *Nollan, supra,* we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of 'unconstitutional conditions' the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit." (*Dolan, supra,* 512 U.S. at pp. ___-___ [114 S.Ct. at pp. 2316-2317], italics added.) The *Dolan* court found an additional reason for treating the dedication in question according to a higher standard. Most land use regulations "involve essentially legislative determinations classifying . . . areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." (*Id.* at p.

___ [114 S.Ct. at p. 2316].) The court also made clear that in such cases the burden rests with the city "to justify the required dedication." (*Id.* at p. ___, fn. 8 [114 S.Ct. at p. 2320, fn. 8].)

Are development fees more like dedications, which will receive a heightened judicial scrutiny, or like zoning and other land use restrictions, which are reviewed with greater deference? The answer to that question is not simple – to some extent monetary exactions are sui generis. But in one fundamental sense, monetary exactions are more like zoning restrictions: like these restrictions they do not involve a physical invasion of property, but merely a diminution in its economic value. As such, development fees may be placed in a class not only with such land use regulations, but also with other sorts of economic regulations that may significantly reduce the profit or value derived from property, yet are not deemed to be takings unless the regulations are arbitrary or confiscatory. (See *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 292-297 [rate regulation can only be a taking if confiscatory]; *United States v. Sperry* (1989) 493 U.S. 52, 60 [reasonable user fees that reduce the value of arbitration award not a taking].)

It could be argued that the appropriation of a property owner's money, in the form of a development fee, can be considered a "physical invasion" of monetary assets, and therefore as constitutionally objectionable as the physical occupation of real property. The United States Supreme Court has decisively rejected such equivalency. In *United States v. Sperry, supra,* 493 U.S. 52 (*Sperry*), a case that will be discussed at greater length below, the court upheld a deduction of a percentage of an award

received from the Iran-United States claims tribunal as a reasonable user fee. Plaintiff corporation argued that such a dedication "was akin to a 'permanent physical occupation' of its property and therefore was a per se taking requiring just compensation [citing *Loretto*]." (*Id.* at p. 62, fn. 9.) The court responded: "It is artificial to view a deduction of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring [plaintiff] to pay it separately. If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including filing fees that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*." (*Ibid.*)

In fact, unlike the physical appropriation of real property, the government "takes" money from property owners in numerous circumstances with typically minimal constitutional constraints, as discussed immediately below.

B. Constitutional Review of Taxes, Assessments, User Fees, and Other Fees.

To put the matter simply, the taking of money is different, under the Fifth Amendment, from the taking of real or personal property. The imposition of various monetary exactions – taxes, special assessments, and user fees – has been accorded substantial judicial deference. As elaborated below, many if not most development fees resemble such exactions in that they are categorically

applied to a general class–to all developments or to certain types of development. The imposition of such development fees, like other general fees, has also been given substantial deference. What follows is a brief account of the constitutional standards used for determining the validity of these various types of monetary exactions.

First, government is obviously able, constitutionally, to take money from property owners as part of a valid scheme of taxation. The separation of powers doctrine dictates that courts allow states and their subdivisions considerable flexibility in the imposition of varying tax burdens on different classes of tax payers. "Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality . . . . [States] may impose different specific taxes upon different trades and professions and vary the rate of excise upon various products. [They are] not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." (*Allied Stores of Ohio v. Bowers* (1959) 358 U.S. 522, 526-527.) Courts will not invalidate a state taxation scheme unless the classifications used are without "rational basis" and are "palpably arbitrary." (*Id.* at p. 527.)

Of particular relevance for the issue of development fees, California courts have upheld on numerous occasions excise taxes that charge fees on new development for purposes of raising general revenue, in which no close "nexus" or "reasonable relationship" is required. (See *Centex Real Estate Corp. v. City of Vallejo* (1993) 19 Cal.App.4th 1358 [upholding excise tax of $3,000 per unit

of residential development and $.30 per square foot of nonresidential development]; *The Pines v. City of Santa Monica* (1981) 29 Cal.3d 656 [upholding $1,000 fee for sale of new or converted condominiums]; *Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes* (1977) 73 Cal.App.3d 486 [upholding excise tax of $500 per bedroom, up to a maximum of $1,000 per dwelling unit]; *Associated Home Builders, Inc. v. City of Newark* (1971) 18 Cal.App.3d 107 [upholding per bedroom excise tax].) As the Court of Appeal recently explained in *Centex Real Estate Corp., supra,* 19 Cal.App.4th at page 1364: " '[A]n excise tax is a "tax on the exercise of one of the incidences of property ownership," such as the ability to transfer or devise property ownership or the ability to use, store, or consume it.' " Accordingly, "[a]n excise tax may properly be imposed on the privilege of developing property" as one such incidence of property ownership. (*Ibid.*)

While the takings clause is concerned in part with preventing those whose property has been appropriated or destroyed by government action from "bear[ing] public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong v. United States* (1960) 364 U.S. 40, 49), the equal protection clause generally permits government to impose unequal tax burdens on individuals as long as they are rationally based. There is no indication that *Nollan* and *Dolan* have superseded equal protection doctrine in the realm of taxation, even if the taxes affect the value of property or the profits from development. But if a municipality can constitutionally impose a development tax as long as it is rationally based, why is a higher level of constitutional

scrutiny required when, as in the case of generally applicable development fees, the "tax" is earmarked for use in alleviating specific development impacts rather than for the general fund?

Another kind of monetary exaction on property owners which is subject to a fairly deferential standard of judicial review is special assessments. Special assessment districts are established to permit cities and counties to charge groups of property owners for improvements from which they will especially benefit; the individual assessments are to be calculated in proportion to the estimated benefits to the parcels against which they are assessed. (Sts. & Hy. Code, §§ 10203-10204; *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683-684 (*Dawson*).) Although no recent California case considers a takings challenge to a special assessment, the case of *Waters v. Montgomery County* (MD. 1994) 650 A.2d 712, is directly relevant. In that case, Maryland's highest court upheld a "development impact tax" that functioned much like a benefit assessment or excise tax, imposing monetary exactions on all development within certain undeveloped areas of Montgomery County according to a per residential unit or per square foot measurement, and spending the funds to improve roads and other transportation facilities within these areas. (*Id.* at p. 714.) The court considered an equal protection challenge to the fee, and upheld the fee as an economic regulation with a "rational basis" – it was reasonable to conclude that development in the two areas would lead to a need for increased transportation facilities. (*Id.* at pp. 721-723.) The court also rejected the argument that the takings clause, as interpreted by *Dolan*, requires that such an assessment be subject to

greater constitutional scrutiny than the equal protection clause would demand. It concluded that *Dolan* was distinguishable in part because it required that the property owner " 'deed portions of the property to the city.' " (*Id.* at p. 724.) The tax in question neither compelled a physical invasion of the property nor denied " 'all economically productive or beneficial use of the land,' " and was therefore not a taking. (*Ibid.*)[1]

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[1] Although there are no recent takings cases in California involving special assessments, a challenge to a special assessment district is typically framed in terms somewhat similar to a takings challenge – that a property owner is being asked to pay for services from which he or she does not specially benefit, and which should be borne by the public as a whole through taxation. (See *Knox v. Orland* (1992) 4 Cal.4th 132, 143 [assessment is challenged as failing to provide special benefits and is therefore a "special tax."] But as we have stated: "The scope of judicial review of such [assessments] is . . . narrow. 'The board of supervisors is the ultimate authority which is empowered to finally determine what lands are benefited and what amount of benefits shall be assessed against the several parcels benefited . . . . This determination is made after a full hearing accorded to all persons interested to make such objection as they see fit. In such a case the court will not declare the assessment void unless it can plainly see from the face of the record, or from facts judicially known, that the assessment so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed." (*Dawson, supra,* 16 Cal.3d at p. 684; see also *Knox v. Orland, supra,* 4 Cal.4th 132, 147 [reaffirming the validity of the *Dawson* standard]; see also *J.W. Jones Companies v. City of San Diego* (1984) 157 Cal.App.3d 745 [approving benefit assessment for new development based on long-range estimates of the need for public facilities generated by the new development].)

Moreover, even if a special assessment is found to be disproportionate to the benefit provided, and therefore a

The government is also given broad discretion to charge user fees, and the recent case of *Sperry, supra,* 493 U.S. 52, makes clear that judicial review of such fees under the taking clause is similarly narrow. In that case the court upheld against a takings challenge the deduction of a portion of a judgment awarded to plaintiff corporation from the Iranian government in order to pay for the expenses of the Iran-United States Claims Tribunal, although the corporation claimed not to have proportionately benefited from the tribunal. (*Id.* at pp. 63-64.) As the *Sperry* court reaffirmed, "the Just Compensation Clause 'has never been read to require the . . . courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received' in determining whether a 'taking' has occurred.' " (*Id.* at p. 61, fn. 7.) In order to withstand a takings challenge, a user fee does not have to be "precisely calibrated to the use that a party makes of Government services. All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied." (*Id.* at p. 60.) The court recognized "that when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system, but we [decline] to impose a requirement that the

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"special tax" within the meaning of article XIII A, section 4 of the California Constitution, it does not follow that the assessment would also be a taking. The conclusion that a development fee is really a special tax only signifies that the fee cannot be adopted without the approval of two-thirds of the electorate, not that it cannot be lawfully adopted at all, as would be the case were the assessment a taking.

Government 'give weight to every factor affecting appropriate compensation . . . . ' " (*Id.* at p. 61; see also *Webb's Fabulous Pharmacies v. Beckwith* (1980) 449 U.S. 155, 163 [user fees will be upheld if they have some police power justification].)

Many development fees bear a close resemblance to the excise taxes, assessment fees and user fees discussed above. They are perhaps best characterized as a special assessment placed on developing property, calculated according to preestablished legislative formulae based on square footage or per unit of development. (See *J.W. Jones Companies v. City of San Diego, supra,* 157 Cal.App.3d 745 [fee apportioning projected future public costs of development among developers in several areas of the city]; see also *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459 [$4,000 per lot environmental mitigation fee]; *Garrick Development Co. v. Hayward Unified School Dist.* (1993) 3 Cal.App.4th 320 [school fees of $1.50 per square foot of nonresidential development]); *Blue Jeans Equities West v. City and County of San Francisco* (1993) 3 Cal.App.4th 164, 170-171 [transportation fee of up to $5.00 per square foot levied on commercial development]; *Commercial Builders of Northern California v. City of Sacramento* (1991) 941 F.2d 872, 874-875 [upholding low income housing fee on commercial development according to legislated formula]; *Shapell Industries, Inc. v. Governing Board of the Milpitas Unified School District* (1991) 1 Cal.App.4th 218 [school fees of $1.50 per square foot].) Courts have granted considerable discretion to local government to impose such fees, and have upheld them against takings and related challenges. (See, e.g., *Garrick Development Co. v. Hayward Unified School*

Dist., supra, 3 Cal.App.4th at p. 337; *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd., supra,* 23 Cal.App.4th at pp. 1477-1478; *Blue Jeans Equities West v. City and County of San Francisco, supra,* 3 Cal.App.4th at pp. 170-171; *Commercial Builders of Northern California v. City of Sacramento, supra,* 941 F.2d at pp. 874-875.)

The above cases illustrate the difference, for purposes of takings clause jurisprudence, between judicial review of the government's physical taking of property and its charging of fees. A comparison of these cases with *Loretto, supra,* 458 U.S. 419, brings this difference into clearer focus. While laws that impose generally applicable taxes, assessments and fees will be upheld if they are rationally based, an equivalent, generally applicable measure that authorizes the physical occupation of a small portion of property belonging to a large class of property owners – forced access for cable television wires and boxes – is deemed to be a taking. (*Loretto, supra,* 458 U.S. at p. 438.) It is therefore illogical doctrinally to assert, as plaintiff and his numerous amici curiae do in this case, that development fees will invariably be subject to the same rigorous constitutional scrutiny as compelled dedications of property.

In sum, it does not appear that *Nollan* or *Dolan* alter the restricted judicial review applicable to general governmental fees – a restriction rooted in the separation of powers doctrine – merely because a property owner can recast his challenge to a fee as a takings claim, asserting that he was being asked to pay for a disproportionate share of public improvements or services in exchange for a development permit. On the contrary, the cases show that the constitutionality of such fees will be judged

under a standard of scrutiny closer to the rational basis review of the equal protection clause than the heightened scrutiny of *Nollan* and *Dolan*.

This is not to imply that legislative development fees do not implicate the takings clause. Because these fees are forms of land use regulation, they must "advance legitimate state interests." (*Agins v. Tiburon, supra,* 447 U.S. at p. 260.) A disproportionate fee raises the possibility of arbitrary or discriminatory government action. But *Nollan* and *Dolan* do not change the basic principle that courts will not unduly interfere with the essentially legislative function of adopting fees and fee structures that advance the public interest. In other words, such fees are "public program[s] adjusting the benefits and burdens of economic life to promote the common good" which will be reviewed by courts in a more deferential manner than physical invasions of property. (*Penn Central Transportation Company v. City of New York, supra,* 438 U.S. at p. 124.)

Of course, a court's constitutional inquiry will vary with the nature of the state interest purporting to justify the monetary exaction under review. If the government's interest is in raising revenue generally, then courts will uphold the tax so long as the special burden it imposes on developers is rationally based. If, as in the case of the art-in-public places fee at issue in this case, the fee is for the purpose of furthering certain legitimate aesthetic objections, then this fee will be upheld if it can be shown to substantially further those objections. If the fee is imposed to mitigate the impacts of development, then it will be upheld if there is a reasonable relationship between the fee and the development impact. (See *Associated Home Builders v. City of Walnut Creek* (1971) 4 Cal.3d

633, 640.) If the fee is defined as a user fee, then the fee will be upheld if there is a reasonable relationship between the government's cost of service and the fee. But in each of these cases, the degree of scrutiny is not appreciably different. Courts will, for federal constitutional purposes, defer to the legislative capacity of the states and their subdivisions to calculate and charge fees designated for legitimate government objectives, unless the fees are plainly arbitrary or confiscatory.

There are, of course, a number of legal constraints in this state – other than the Fifth Amendment – on the government's ability to impose development fees. Government Code section 66000 et seq. extensively regulates the imposition of development fees, including requirements that the purpose of the fee must be identified with specificity, and that a "reasonable relationship" must exist between the fee's use and the type of development project on which the fee is imposed. (Gov. Code, § 66001, subd. (a)(3).)[2] The statutory scheme also mandates a

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[2] I agree with the plurality that Government Code section 66001 incorporated a "reasonable relationship" standard set forth in *Associated Home Builders v. City of Walnut Creek, supra*, 4 Cal.3d at page 640, and its progeny, a standard less exacting than *Dolan's* "rough proportionality" test. A review of the legislative history of Assembly Bill No. 1600, 1987-1988 Regular Session (Assembly Bill No. 1600), which included section 66001, confirms that view. In an analysis of Assembly Bill No. 1600 by the Senate Local Government Committee immediately before the enactment of the bill, it was stated: "The U.S. Supreme Court's June 26 *Nollan* [case] overturned the California Coastal Commission's imposition of a lateral public access easement as a condition of approving a residential development in the coastal zone . . . . Some observers have interpreted this decision

public hearing process for the adoption of a fee, and a procedure for the refund of unused portions of the fee. (Gov. Code, §§ 66001, subds. (e), (f), 66016-66018; see also *Garrick Development Co. v. Hayward Unified School Dist.*, *supra*, 3 Cal.App.4th 320.) Moreover, a development fee which exceeds the burdens and benefits of development

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as an instruction to local agencies to find a more direct link between exactions and public purposes. [Assembly Bill No.] 1600 moves in this direction. The issue will be whether it goes far enough. Because the bill does not take effect until January 1, 1989, the Legislature will have ample opportunity to conform it with the *Nollan* case, if it chooses." (Sen. Local Gov. Com. Rep. on Assemb. Bill No. 1600 (1987-1988 Reg. Sess.) as amended Aug. 18, 1987, p. 2.) The fact that the Legislature did not amend the bill after that indicates that it did not intend to fully incorporate the *Nollan* standard to development fees, much less the *Dolan* standard formulated seven years later. The same report also makes clear that the "reasonable relationship" standard of section 66001 was intended to "conform to case law," i.e., *Associated Home Builders* and related California cases. (*Id.* at p. 3.)

Whether the less demanding statutory standard or more demanding constitutional standard applies is ultimately a constitutional question and depends, as I have argued, and as the other members of this court appear to agree, on whether or not the fee is generally applicable. Whichever standard applies, the plurality is, of course, correct in concluding that anyone challenging either the statutory or constitutional validity of a development fee must follow the procedures set forth in Government Code section 66020 et seq. And while section 66001 cannot be said to have incorporated the *Nollan/Dolan* standard in any formal sense, I agree with the plurality that "the term 'reasonable relationship' embraces both a constitutional and a statutory meaning which, for all practical purposes, have merged *to the extent* that the *Dolan* decision applies to development fees . . . . " (Plur. opn., *ante*, at p. 12, italics in original.)

will be found to be a special tax that requires two-thirds voter approval under article XIII A, section 4 of the California Constitution. (See *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, 1220 [invalidation of excessive fire hydrant fee as a special tax]; *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1984) 165 Cal.App.3d 227, 238 [invalidation of water system hookup fee as a special tax].)

Even under more deferential review, a court's inquiry into the validity of the reasonable relationship between a development fee and a development impact will not be a "rubber stamp." (See, e.g., *Shapell Industries, Inc. v. Governing Board of the Milpitas Unified School District, supra,* 1 Cal.App.4th 218, 235-236; *Balch Enterprises, Inc. v. New Haven Unified School Dist.* (1990) 219 Cal.App.3d 783, 794-795.)[3] But *Nollan* and *Dolan* in most cases impose no *additional* constitutional burden on the government to justify development fees beyond the burden it already bears under the state constitution and statute. (See *Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at p. 337; *Blue Jeans Equities West v. City and County of San Francisco, supra,* 3 Cal.App.4th at p. 171.)

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[3] Indeed, it is arguable that even under a more deferential standard of review, the recreation fee in this case would have been invalid, because it was based on a fundamental methodological or conceptual flaw. (See, e.g., *Shapell Industries, Inc. v. Governing Board of the Milpitas Unified School District, supra,* 1 Cal.App.4th at pp. 235-236 [school fee erroneously attributing all future expansion of enrollment to new development partially invalid].)

In sum, general development fees will usually be subject to a less exacting standard of review under the takings clause than the physical taking of property.

C. *Nollan, Dolan* and the Recreation Fee.

Nonetheless, I agree with the plurality that a somewhat higher level of constitutional scrutiny should be applied to a development fee when it is imposed "neither generally nor ministerially, but on an individual and discretionary basis." (Plur. opn., *ante*, at pp. 24-25.) The heightened scrutiny under these circumstances is derived from *Nollan*'s and *Dolan*'s central concern that government not convert a valid regulation of land use into " 'an out-and-out plan of extortion' " (*Dolan, supra*, 512 U.S. at p. ___ [114 S.Ct. at p. 2317], quoting *Nollan, supra*, 483 U.S. at p. 836) that does not advance a *legitimate* governmental objective. Although development fees are not physical takings of property, they bear greater similarity to physical takings than to zoning and other such land use regulations in this sense: both physical and monetary exactions require developers to directly contribute valuable assets to the public weal in exchange for permission to develop their property. In both cases, there is a potential for the government to engage in extortionate behavior. This risk diminishes when the fee is formulated according to preexisting statutes or ordinances which purport to rationally allocate the costs of development among a general class of developers or property owners – indeed, as discussed above, the separation of powers doctrine clothes such a fee in a presumption of constitutionality. But when the fee is ad hoc, enacted at the time the development

application was approved, there is a greater likelihood that it is motivated by the desire to extract the maximum revenue from the property owner seeking the development permit, rather than on a legislative policy of mitigating the public impacts of development or of otherwise reasonably distributing the burdens of achieving legitimate government objectives.

Indeed, even in the case of zoning regulations, to which courts have been traditionally deferential, a more rigorous form of judicial review, fueled by a suspicion of legislative motive, has been employed when the regulation applies uniquely to a single property owner – so-called "spot zoning." Spot zoning is said to exist " '[w]here a small parcel is restricted and given less rights than the surrounding property . . . . ' " (*Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 960.) When the zoning ordinance appears to subject a property owner to a special restriction not applicable to similarly situated adjacent property, courts will conduct a more searching inquiry into the reasons and motives of the legislative body to determine if the zoning is arbitrary and discriminatory. (See *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338; *Ross v. City of Yorba Linda, supra,* 1 Cal.App.4th at pp. 962-963; *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 337; see also, Longtin, California Land Use (1995 Supp.) § 1.34.) As explained in *Arnel Development Co.*: "The usual test when a zoning ordinance is attacked as being in excess of the police power is whether or not the ordinance bears a substantial and reasonable relationship to the public welfare. [Citations.] However, '[t]he principle limiting judicial inquiry into the legislative body's police power

objectives does not bar scrutiny of a quite different issue, that of discrimination against a particular parcel of property. "A city cannot unfairly discriminate against a particular parcel of land, and the courts may properly inquire as to whether the scheme of classification has been applied fairly and impartially in each instance." ' " (*Arnel, supra,* 126 Cal.App.3d at p. 336.)

In the same manner, when a municipality singles out a property developer for a development fee not imposed on others, a somewhat heightened scrutiny of that fee is required to ensure that the developer is not being subject to arbitrary treatment for extortionate motives. These singular fees present a greater possibility that the government is unfairly imposing disproportionate public burdens on a lone, and therefore particularly vulnerable, property owner. Hence the need for closer judicial review.[4]

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[4] I note that the distinction between generally applicable regulations and those imposed discretionarily on a single property owner is critical in the context of takings jurisprudence only when monetary fees, rather than the physical occupation of land, is in question. As explained above, even generally applicable laws which authorize the physical occupation of property are takings (see *Loretto, supra,* 458 U.S. at pp. 3176-3177), or, in the case of regulations that occur in the development permit process, subject to a greater presumption that a taking has occurred. (*Dolan, supra,* 512 U.S. at pp. ___ [114 S.Ct. at pp. 2313, 2321-2322].) Thus in *Dolan,* the bicycle path dedication regulations were legislatively formulated, derived from the City of Tigard's Community Development Code, which mandated dedication of land for bicycle pathways consistent with a bicycle/pedestrian pathway plan. (*Id.* at p. ___ [114 S.Ct. at p. 2313].) Although it may have been constitutionally permissible for the city to impose a bicycle path

That is not to imply that a local government's actions will be subject to heightened scrutiny each time it engages in the *individualized* assessment of a development project's public impacts. Indeed, such assessments may be preferable, for reasons of fairness and accuracy, to fees that are completely predetermined according to rigid legislative formulae, and it would be illogical to impose on them more formidable constitutional hurdles. But when, as in this case, the local government exacts a type of development fee which is imposed on no one else, and which is based on no preexisting legislative guidelines, a more searching constitutional inquiry into the basis of the fee is required.

Thus, the type of judicial review set forth in *Nollan* and *Dolan* is necessary, under the limited circumstances described above, to ensure "that the [government's] monopoly power over development permits is not illegitimately exploited by imposing conditions that lack any logical affinity to the public impact of a particular land use." (Plur. opn, *ante*, at p. 25.) I therefore conclude that the recreation fee at issue in the present case is required to meet the "rough proportionality" standard prescribed under *Dolan*.

"tax" or assessment on all downtown developers, with little or no showing of the individual impact of each development, it was not similarly constitutional to compel developers to cooperate in the city's land banking scheme by requiring them to dedicate a portion of their property to the city for a bicycle path in fulfillment of the city's general plan, irrespective of the public impacts of their developments.

II.

As stated above, I concur in the plurality's analysis of the recreation fee. I would add two additional points.

First, this is not a case in which the government has asserted an interest in the protection of specific facilities or improvements, as when government regulates the closure or conversion of rental housing. (See *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 898-899 [controls on conversion of residential hotels and requirements to contribute to replacement costs upheld]; *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97 [upholding ordinance controlling exit from rental housing business]; Gov.Code, § 65863.7, subd. (e) [authorizing local government's to require that mobile home park owners who close their facilities pay the "reasonable costs of relocation"]; Gov.Code, § 7060.1, subd. (c)(1) [affirming the power of public entities to "mitigate any adverse impact on persons" displaced as the result of the closure of residential hotels].) In such cases, the government may have a constitutionally legitimate interest in preserving an existing private facility that has public value, and in requiring mitigation fees if the facility is closed or put to a different use. But in the present case, the City had asserted no interest in preserving any particular facility, and had, indeed, permitted without condition the demolition of plaintiff's health club. As the plurality correctly conclude, the sole interest advanced by the City is in the preservation of a type of land use rather than of a facility, and any recreational fee must be measured in terms of the loss of that use.

Second, it should be recognized that although the City must employ a "rough proportionality" analysis on remand, the issue before it is a different one from that presented in *Nollan* and *Dolan*. In both those cases, the courts assumed that the developments in question had public impacts of some magnitude but found the evidence lacking that the taking of public easements significantly mitigated those impacts. (*Nollan, supra,* 483 U.S. at pp. 838-839; *Dolan, supra,* 512 U.S. at p. ___ [114 S.Ct. at pp. 2320-2322].) The question that must be addressed in the present case, on the other hand, is whether and to what extent the change in the recreational land use designation of plaintiff's property had a public impact – the loss of recreational opportunities to the residents the City – that would justify a special recreational fee. But assuming that a public impact is identified and a fee of some amount is constitutionally justified, there is no question that the City's proposed use of such fee – to construct public tennis courts or other such facilities – would directly mitigate that impact.

Thus, although the City must calculate the amount of the recreation fee in terms of the added costs of inducing the creation of *private* recreational facilities attributable to the changed land use (plur. opn., *ante,* at pp. 35-36), it is not constitutionally forbidden from determining that the best use of the fee is to build *public* tennis courts or other facilities. It is the role of the legislative body, rather than the courts, to determine the best uses of the revenue obtained from a development fee, as long as the expenditure of the fee is reasonably related to the alleviation of the development impact that is its purported justification.

I also agree with the plurality that the art fee is a generally applicable fee substantially related to legitimate aesthetic objectives promoted by the City. It is therefore constitutional, and not subject to the *Nollan/Dolan* analysis.

MOSK, J.

EHRLICH v. CITY OF CULVER CITY

S033642

CONCURRING AND DISSENTING OPINION BY KENNARD, J.

I concur in the judgment insofar as it upholds the "art in public places" fee. I agree with the majority that this fee, imposed under an ordinance of general applicability, is not subject to the "essential nexus" and "rough proportionality" requirements that the United States Supreme Court established in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. ___ [114 S.Ct. 2309] (*Dolan*) to determine whether certain development conditions violate the Takings Clause of the Fifth Amendment to the United States Constitution. I further agree with the majority that the art in public places fee is valid under traditional standards for judging the constitutional validity of development requirements of general applicability.

I dissent from the judgment insofar as it concludes that a city may impose a mitigation fee for the "loss" of private recreation facilities when property on which such

facilities were located is redeveloped for a different use. On this issue, I agree with the majority that *Nollan/Dolan's* "essential nexus" and "rough proportionality" requirements apply to monetary exactions that, like the mitigation fee involved here, are imposed on a specific parcel of property as a condition of obtaining a development permit. I also agree with the majority that a city may not impose a recreational mitigation fee in an amount sufficient to replace the "lost" private facilities with new public facilities. But I do not agree with the majority that a city may require a landowner to compensate the city for the projected expenses of (1) imposing development restrictions on other land, or (2) otherwise encouraging the construction of other private recreation facilities to replace those "lost" through redevelopment.

I further disagree with the plurality's decision, as expressed in Justice Arabian's opinion, to "gloss" certain state laws regulating mitigation fees (Gov. Code, § 66000 et seq.; hereafter Mitigation Fee Act) to make their provisions coincide exactly with the restrictions imposed by the Takings Clause of the Fifth Amendment to the United States Constitution. This case was litigated under the Takings Clause, not our state's Mitigation Fee Act; thus, there is no need to construe the Mitigation Fee Act to decide this case.

I

Between 1973 and 1975, Richard Ehrlich (Ehrlich) acquired a 2.4-acre lot in Culver City (City) and applied for approval to develop a private tennis club and recreational facility on the site. City amended its zoning and

general plan ordinances and adopted a specific plan to allow for the construction of the facility. When developed by Ehrlich, the site had five tennis courts, a heated swimming pool, a jacuzzi, paddle tennis courts, an aerobics area, and a separate building for lockers and other facilities.

In 1981, after a number of different managers had failed to make the private club operate at a profit, Ehrlich applied for approval to replace the private recreational club with an office building. When City's planning commission opposed the application on the ground that Ehrlich's private club filled a community need for recreational facilities, Ehrlich abandoned the application.

In August 1988, Ehrlich closed the facility because of continuing financial losses. He then applied for a specific plan amendment and tentative tract map approval to develop the site into a 30-unit townhouse project.

City initially expressed interest in acquiring the property for use as a city-owned recreational facility. Its staff advised City that Ehrlich's property offered an opportunity "to preserve an existing sports/recreational facility for public use and relieve pressure on existing facilities." An independent feasibility study commissioned by City concluded that, according to national standards, City needed two to four tennis courts and more public swimming pools and gymnasiums. Although the study criticized Ehrlich's operation of the private club formerly on the property, it also found that extensive capital improvements would be necessary to make the site financially viable for recreational use.

In March 1989, Ehrlich obtained a demolition permit and demolished the recreational facilities at the site, donating to City the equipment that was still useful after demolition. In April 1989, City decided, based on its independent feasibility study, that it did not have sufficient funds to acquire the site and use it as a public sports complex. It also decided not to assume the substantial financial risks involved in acquiring the property for operation on a membership, fee-for-service basis. Based on its concern about the loss of recreational land use, City denied Ehrlich's application to develop the site with townhouses.

In subsequent discussions with City, Ehrlich was told that his development application would be granted only if he agreed to build new recreational facilities for City. In response, Ehrlich filed, but did not serve, the petition for writ of mandate and complaint for damages in this case. City then rescinded its earlier denial of Ehrlich's application and granted it subject to certain conditions, including payment of a $280,000 recreational mitigation fee and a $33,200 art in public places fee. The recreational mitigation fee was to be used "for additional recreational facilities" to replace the facilities "lost" when Ehrlich ceased using his property for commercial recreational purposes. The amount of this fee was based on City's estimate of the cost of building public recreational facilities. The art in public places fee was imposed under a municipal ordinance that requires commercial projects with a value in excess of $500,000 to either provide art work for the project in an amount equal to 1 percent of the total value

of the building or to pay an equal amount to the City Art Fund.[1]

Ehrlich formally protested both the recreational mitigation fee and the art in public places fee. When City denied his protests, Ehrlich amended his pleadings in this action to allege that the fees were an unconstitutional taking. Ehrlich and City then agreed that Ehrlich would pay the fees under protest, retaining the right to proceed with this lawsuit, in return for City's issuance of the necessary development permits.

In Ehrlich's action, the trial court invalidated the $280,000 recreational mitigation fee because it was "simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer." The trial court upheld the constitutionality of the $33,200 "art in public places" fee.

The Court of Appeal initially affirmed the trial court's judgment, but then granted a rehearing and, in a published opinion (*Ehrlich v. City of Culver City* (1993) 15 Cal.App.4th 1737), reversed the trial court's ruling that the $280,000 fee was an unconstitutional taking. The Court of Appeal reasoned that there was a substantial nexus between the proposed project and the fee because the fee compensated City for the burden to the community caused by the "loss" of Ehrlich's private recreational facilities. (*Id.* at p. 1750.) The United States Supreme

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[1] City also required Ehrlich to pay a $30,000 parkland fee to provide for anticipated increased demand on public park and recreational facilities by the residents of the proposed townhouse development. Ehrlich has not contested the validity of this fee and it is not at issue on this appeal.

Court then granted certiorari and remanded the case to the Court of Appeal "for further consideration in light of *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309. . . . " (*Ehrlich v. City of Culver City* (1994) 512 U.S. ___ [114 S.Ct. 2731-2732].) On remand, a divided Court of Appeal, this time in an unpublished opinion, again upheld the $280,000 recreational mitigation fee. We granted review.

II

The Fifth Amendment to the United States Constitution, made applicable to state and local governments by the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " (*Nollan, supra*, 483 U.S. 825, 835-836, fn. 4, quoting *Armstrong v. United States* (1960) 364 U.S. 40, 49.)

In two landmark decisions – *Nollan, supra*, 483 U.S. 825, and *Dolan, supra*, 512 U.S. ___ [114 S.Ct. 2309] – the United States Supreme Court has defined the scope of the protection that the Fifth Amendment's Takings Clause affords in the context of conditions imposed on the granting of land use permits. In so doing, the court has drawn a distinction between conditions legislatively imposed by laws or rules of general applicability, on the one hand, and conditions adjudicatively imposed on specific parcels, on the other hand.

If a condition is imposed pursuant to an ordinance or rule of general applicability – that is, as a result of a

legislative determination – the condition is constitutionally permissible unless the landowner meets his or her burden of proving that the condition either does not substantially advance a legitimate governmental purpose or deprives the landowner of any economically viable use of the land. (*Dolan, supra,* 512 U.S. ___, ___ [114 S.Ct. 2309, 2316-2317, 2320], fn. 8; *Agins v. Tiburon* (1980) 447 U.S. 255, 260.)

If a condition is *adjudicatively* imposed, however, the government bears the burden of establishing (1) that the condition has an "essential nexus" with a legitimate government interest that would have justified denial of the permit, and (2) that there is a "rough proportionality" between the burden imposed by the condition and the projected impact of the proposed development. (*Dolan, supra,* 512 U.S. ___, ___ [114 S.Ct. 2309, 2317-2319]; *Nollan, supra,* 483 U.S. 825, 834-837.)

With these standards in mind, I proceed to the issues presented here.

A. The Mitigation Fee Act

As a preliminary matter, the plurality, as explained in Justice Arabian's opinion, decides to "gloss" the provisions of California's Mitigation Fee Act (Gov. Code, § 66000 et seq.) to make its provisions correspond to the standards that the United States Supreme Court enunciated in *Nollan, supra,* 483 U.S. 825, and *Dolan, supra,* 512 U.S. ___ [114 S.Ct. 2309]. (Plur. opn., *ante,* at pp. 2, 11.) I see no need for this. Ehrlich has not challenged the validity of the Mitigation Fee Act, nor was this issue addressed by the trial court. In the event of some conflict

between the standards set forth in the Mitigation Fee Act and the standards required by the federal Constitution, the constitutional standards must necessarily control. Accordingly, the issue in this case is constitutional, not statutory.

B. The Art in Public Places Fee

The art in public places fee was imposed under a municipal ordinance of general applicability. Accordingly, the $33,200 fee is constitutionally valid unless Ehrlich proves that the fee either does not serve a legitimate government purpose or deprives him of any economically viable use of the land. (*Dolan, supra,* 512 U.S. ___, ___ [114 S.Ct. 2309, 2316-2317, 2320], fn. 8.) Enhancing the aesthetic environment of the community is a legitimate government purpose, and Ehrlich has not demonstrated that the amount of the fee, which equals only 1 percent of the project value, makes the project economically unfeasible or otherwise deprives him of any economically viable use of the land. Accordingly, I concur with the majority that this fee is constitutionally permissible.

C. The Recreational Mitigation Fee

1. *Is* Nollan/Dolan *applicable to a monetary fee?*

In both *Nollan, supra,* 483 U.S. 825, and *Dolan, supra,* 512 U.S. ___ [114 S.Ct. 2309], the condition at issue required the landowner to grant a possessory interest in part of the property to the public or to the government. Seizing on this factual circumstance, City here contends

that *Nollan/Dolan's* "essential nexus" and "rough proportionality" requirements apply only to such conditions and not to conditions requiring payment of a sum of money, however large. The majority rejects this contention, holding that the "essential nexus" and "rough proportionality" requirements imposed by the United States Supreme Court's construction of the Takings Clause apply not only to conditions requiring surrender of a possessory interest in land, but also to conditions requiring monetary payments, provided that the conditions are *adjudicatively* imposed in a discretionary permit process. (Plur. opn., *ante,* at pp. 2, 11-13; conc. & dis. opn. of Werdegar, J., *post,* at p. 1.) For the reasons given by the majority, I concur in this holding.

Because the $280,000 recreational mitigation fee was imposed on Ehrlich's development application individually, and not pursuant to an ordinance or rule of general applicability, the constitutionality of this fee is evaluated using the *Nollan/Dolan* "essential nexus" and "rough proportionality" analysis.

2. *Essential Nexus*

The first component in the *Nollan/Dolan* analysis is determining whether the challenged condition has an "essential nexus" with a legitimate government interest that would have justified denial of the permit. This component, in turn, may be broken down into three steps: (1) determining whether the government could have denied the permit application entirely; (2) identifying one or more legitimate government interests that would have justified denial of the permit application; (3) determining

whether the condition has an "essential nexus" with the impact of the proposed development on one or more of the identified interests.

The denial of a land use permit application effects a taking of the property, for which the government must pay compensation, if the denial does not substantially advance a legitimate state interest or if it deprives the owner of " 'economically viable use of his land.' " (*Dolan, supra,* 512 U.S. ___, ___ [114 S.Ct. 2309, 2316], quoting *Agins v. Tiburon, supra,* 447 U.S. 255, 260; see also *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. ___ [112 S.Ct. 2886, 2894-2895].) Thus, it is necessary to determine whether denial of Ehrlich's permit application would have deprived him of economically viable use of his land. The majority entirely omits this part of the analysis.

Here, Ehrlich's permit application had two purposes: (1) to remove the specific plan restriction that Ehrlich's property be used only for a private recreational club; and (2) to authorize development of the property with a thirty-unit townhouse complex. The evidence presented in the record raises a substantial question as to whether a private recreational club was an economically viable use of the property. Ehrlich had attempted to use the property for this purpose for a period of years but was unable to make it profitable despite several changes of management. Moreover, City itself declined to assume ownership of the property for the purpose of itself operating the private recreational club, concluding that the financial risk would be too great.

A conclusion that a private health club was not an economically viable use of the property would not mean,

of course, that City was required to grant the specific alternative use that Ehrlich requested: a 30-unit townhouse complex. But it would mean that City would be required to authorize *some* economically viable alternative use, rather than simply denying all applications for redevelopment to other uses.

Although the record raises serious doubts on the issue, I need not and do not decide whether City could have completely denied Ehrlich's permit application on the basis of the government interest in maintaining adequate private recreational facilities because, as explained below, I conclude that the recreational mitigation fee fails another part of the *Nollan/Dolan* test.

Assuming, for purposes of argument, that a denial of Ehrlich's permit application would not have deprived him of an economically viable use of his property, would the condition that he pay a recreational mitigation fee have an "essential nexus" to a legitimate government interest?

I do not doubt that a city has a legitimate government interest in providing adequate recreational facilities, both public and private, for its residents. But a city's exaction of a "recreational mitigation fee" from a landowner as a condition of permit approval must satisfy the *Nollan/Dolan* requirement of an "essential nexus" between the fee and the city's interest in denying the proposed development application. (*Nollan, supra,* 483 U.S. 825, 837.)[2] I need not decide in this case whether the recreational mitigation fee satisfies this essential nexus

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[2] Whether an essential nexus exists turns on the connection between the condition imposed on the development and "the

requirement, however, because as I explain below, the fee fails under the "rough proportionality" test.

3. Rough Proportionality

The second component in the *Nollan/Dolan* analysis is determining whether there is a "rough proportionality" between the burden imposed by the permit approval condition and the projected impact of the proposed development. (*Dolan, supra,* 512 U.S. ___, ___ [114 S.Ct. 2309, 2317-2320].)

Because Ehrlich's proposed construction of 30 townhouses on his land would have increased the community's housing stock and thus the number of its residents, City could reasonably impose a fee to offset the increased demand on public recreational facilities attributable to the increase in population resulting from the development. City did exactly this by imposing a $30,000 "parkland" fee. (See fn. 1, *ante.*) Ehrlich has not disputed the validity of this fee.

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projected impact of the proposed development" (*Dolan, supra,* 512 U.S. ___, ___ [114 S.Ct. 2309, 2317]). The United States Supreme Court has not yet clarified whether "the projected impact" includes only positive effects such as the additional burdens that the new development will impose on the community (in this case, the increased demand for city services resulting from the addition of 30 townhouses) or also negative effects such as the reduction in the total area of land zoned for a particular use (in this case, the reduction in land designated for recreational uses) or the loss of public benefits from the preexisting use of the land (in this case, the benefits City residents derived from use of the athletic facilities).

The $280,000 recreational mitigation fee that City imposed on Ehrlich was designed not to offset the increased demand on public recreational facilities caused by the addition of 30 residential units, but instead to compensate for the "loss" of the private recreational club that had previously existed on the property. The distinction is crucial.

The majority partly rejects and partly accepts City's "lost use" or "lost opportunity" rationale for the recreational mitigation fee.

The majority rejects the rationale insofar as it is based on the assumption that a landowner may be required, as a condition to redeveloping property for a different use, to replace private facilities on the property with comparable public facilities. Thus, as the majority recognizes, City may not require Ehrlich to build public recreational facilities to replace the private facilities that existed on his property, nor may it impose a fee in an amount calculated to achieve this end. As the majority aptly states, City "may not constitutionally measure the magnitude of its loss, or of the recreational exaction, by the value of facilities it had no right to appropriate without paying for." (Plur. opn., *ante*, at p. 33.)

But the majority accepts City's "lost use" or "lost opportunity" rationale insofar as it is based on the assumption that a landowner may be required, as a condition to redeveloping property for a different use, to underwrite any government expense likely to be incurred in the process of replacing private facilities on the property with comparable private facilities on other privately owned land. Thus, the majority concludes that City may

charge Ehrlich a recreational mitigation fee measured either by "the additional administrative expenses incurred in redesignating other property within Culver City for recreational use" (plur. opn., *ante*, at p. 33; see also conc. & dis. opn. of Werdegar, J., *post*, at p. 1) or by the "monetary incentives" needed "to induce private health club development" on other land (plur. opn., *ante*, at p. 34; see also conc. & dis. opn. of Werdegar, J., *post*, at p. 1). I disagree. A fee calculated in either manner would require Ehrlich to bear a grossly disproportionate share of what is essentially a public expense.

The fundamental flaw in the majority's reasoning is the assumption that the City, without violating the Takings Clause, could restrict Ehrlich's property to private recreational uses. As discussed above, such a restriction might well deprive Ehrlich of economically viable use of his land and be invalid on that basis. But even if constitutionally valid on that basis, the restriction would be invalid because it impermissibly singled out Ehrlich's property for special restriction. This is akin to prohibited spot zoning.

"Spot zoning occurs where a small parcel is restricted and given lesser rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to uses for residential purposes thereby creating an 'island' in the middle of a larger area devoted to other uses." (*Viso v. State of California* (1979) 92 Cal.App.3d 15, 22; see also *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 960-961.) Because "spot zoning" discriminates against the parcel singled out for special restriction, it is invalid unless the government establishes some reasonable ground for the disparate treatment. (See

Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 132; *Nectow v. Cambridge* (1928) 277 U.S. 183, 188-189; *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 340-341; *Reynolds v. Barrett* (1938) 12 Cal.2d 244, 251.)

Although City has a legitimate government interest in the promotion of private recreational facilities adequate to meet the recreational needs of its residents, in advancing this public interest City may not single out individual landowners or small groups of landowners to bear a disproportionate share of the burden. This is precisely what City does when it permits only recreational uses on an individual parcel that is otherwise indistinguishable from surrounding parcels on which a much broader range of uses is permitted.

Here, Ehrlich initially voluntarily accepted the recreational use restriction in 1975 as a condition of approval of the specific plan for the property. So long as Ehrlich continued to accept the benefits of the specific plan, he might well have been estopped to challenge the validity of the restriction. But Ehrlich has now waived all benefits he received under the previous specific plan in order to redevelop the property for a different use. Having surrendered the benefits, he should no longer be required to bear the burden of the recreational use restriction. City should now permit Ehrlich to use his property in a manner consistent with the uses of surrounding parcels, without unfairly penalizing him for his unsuccessful attempt to operate a private recreational club.

Had Ehrlich applied in 1975 for approval to build townhouses rather than a private recreational club, City would have had no reason to impose a fee for the "loss"

of a recreational land-use designation. Absent some evidence that Ehrlich gained some enduring advantage or City suffered some lasting detriment as a result of Ehrlich's unsuccessful efforts to operate a private recreational club on his land, the removal of the recreational use restriction imposed in 1975 will not support the imposition of any additional fee. (See Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle* (1995) 19 Harv.J.L. & Pub. Policy 147, 156, fn. 43 [characterizing as an "extraordinary notion" the assertion "that once a private landowner has undertaken a permitted common law use, like [construction of] a private swimming pool or tennis court, he either must continue that use or must pay to stop"].)

For example, had Ehrlich received some subsidy as an inducement to accept the recreational use restriction, he might well be required to reimburse City for all or part of the subsidy upon abandonment of the use for which the subsidy had been given. But returning the subsidy he had received would be the extent of his obligation. There is neither justice nor logic in the majority's suggestion that Ehrlich may now be required to fund a subsidy to induce another landowner to accept a "spot zoning" of his or her property that would restrict that property to private recreational uses. Likewise, although Ehrlich may be required to pay an application fee to compensate for City's costs in processing his own permit applications, City may not require him also to underwrite City's administrative costs for land use proceedings relating to other parcels.

CONCLUSION

All of us must bear our fair share of the public costs of maintaining and improving the communities in which we live and work. But the United States Constitution, through the Takings Clause of the Fifth Amendment, protects us all from being arbitrarily singled out and subjected to bearing a disproportionate share of these costs. This constitutional protection does not evaporate when we discontinue a use of our property that we gratuitously undertook and that the government could not constitutionally have required us to continue, no matter how greatly the community may have benefited from that use.

Because I conclude that the trial court correctly decided the issues in this case, I would reverse the judgment of the Court of Appeal with directions to affirm the trial court's judgment.

KENNARD, J.

I CONCUR:

BAXTER, J.

COPY

EHRLICH V. CITY OF CULVER CITY

S033642

CONCURRING AND DISSENTING OPINION BY WERDEGAR, J.

I concur in the judgment. I also agree with the reasoning of the plurality opinion, except for that contained in section II, respecting the Mitigation Fee Act, Government Code section 66000 et seq. I agree with Justice

Kennard there is no need for us to construe the Act in order to decide this case. (Conc. and dis. opn. of Kennard, J., at p. 2.) Accordingly, I would decline to do so.

WERDEGAR, J.

APPENDIX B

Second Appellate District, Division Five, No. B055523, S033642

IN THE SUPREME COURT OF CALIFORNIA

RICHARD K. EHRLICH, Appellant

v.

THE CITY OF CULVER CITY Et Al., Appellants

(Filed Apr. 11, 1996)

Petition for rehearing DENIED.

Kennard, J. and Baxter, J. are of the opinion the petition should be granted.

/s/ Lucas
Chief Justice

APPENDIX C

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

RICHARD K. EHRLICH, Plaintiff and Appellant, v. THE CITY OF CULVER CITY et al., Defendants and Appellants.	B055523 (Super.Ct.No. C730079)

(Filed Dec. 23, 1994)

APPEAL from the judgments of the Superior Court of Los Angeles County, John Zebrowski, Judge. Affirmed in part and reversed in part with directions.

Lisa S. Ehrlich and Edward J. Horowitz for Plaintiff and Appellant.

Pacific Legal Foundation, Ronald A. Zumbrun, Edward J. Connor, Jr. and Timothy A. Bittle as Amici Curiae on behalf of Plaintiff and Appellant.

Norman Y. Herring, City Attorney, Evelyn Keller and Carol Schwab, Deputy City Attorneys; Kane, Ballmer & Berkman, Joseph W. Pannone and Michael D. Montoya for Defendants and Appellants.

This case involves the imposition of two fees imposed on a developer by a municipality as conditions of approval of a development project: (1) a $280,000 fee to mitigate the impact of a requested land-use change (the mitigation fee); and (2) a $33,220 fee in lieu of a requirement that art be placed on the development project (the in lieu art fee). The City of Culver City, the City Council of Culver City and members of the City Council of Culver City (collectively the City) appeal from a judgment of the trial court issuing a writ of mandate invalidating the mitigation fee imposed by the City against Richard K. Ehrlich (the developer)[1] in exchange for approval of a 30-unit townhome development located in the City (the development project). The City contends the mitigation fee was a constitutionally permissible monetary exaction reasonably related to a legitimate public purpose. The developer contends the mitigation fee was an unconstitutional taking of his property, which did not substantially advance a legitimate public purpose directly related to the approval of the development project. The City also contends the trial court erred by releasing its lien against the developer's property and in awarding the developer attorney's fees pursuant to Code of Civil Procedure section 1036.

The developer appeals from the judgment of the trial court denying his petition for writ of mandate to invalidate the imposition of a monetary exaction in the form of the in lieu art fee in exchange for approval of the development project. He also appeals from the denial of his

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[1] Richard K. Ehrlich is the trustee of certain family trusts which are the actual owners of the subject property.

request for attorney's fees pursuant to Government Code section 800 and Code of Civil Procedure section 1021.5.

FACTS

The property in question consists of 2.4 acres located at 4901 Overland Avenue in Culver City (the property). Prior to October 28, 1974, the property was owned by the developer's predecessor in interest and was split-zoned R-1 (single-family dwelling) and C-2 (retail commercial). On October 28, 1974, at the request of the developer's predecessor in interest, the zoning was changed to C-3 (commercial) and a specific plan was adopted providing for the development of a sports facility: a private tennis club and recreational facility. The developer's predecessor in interest did not develop the property, but leased it to the City for use as a Little League baseball field.

In 1975, the developer purchased the vacant property. The developer subsequently improved the property and operated it as a private tennis club and recreational facility. The recreational facility included a heated swimming pool, a jacuzzi, a sauna, five tennis courts, three paddle tennis courts, a jogging track, an aerobics area, and a building with lockers, a kitchen, and other facilities. The estimated value of the improvements was $800,000. The private tennis club was not a financial success. In 1981, the developer applied to the City for changes to the property's land-use restrictions to permit the construction of an office building. This application was denied by the City on the ground that the existing private tennis club facility provided needed recreational facilities for the City.

On August 30, 1988, the developer closed the private tennis club and, subsequently, donated to the City much of the movable equipment associated with the tennis club.

In September 1988, the developer applied to the City for changes to the property's land-use restrictions to permit construction of 30 deluxe townhomes valued at $10 million. The City denied the application in April 1989, on the ground that the land-use restrictions provided the opportunity for needed recreational facilities for the City.

On July 7, 1989, the developer filed a petition for writ of mandate and complaint for damages. In the meantime, the developer sought to obtain the City's reconsideration of its denial. Apparently, the developer offered to build four tennis courts in exchange for approval of the development project. In August and September 1989, the City reconsidered its former denial and approved the development project, subject to certain conditions including the payment of the $280,000 mitigation fee, a $30,000 in lieu parkland fee, and the $33,220 in lieu art fee. On November 3, 1989, the developer amended the complaint. In January 1990, the City and the developer agreed that, in exchange for the City's approval of the development project, the developer would pay the $280,000 mitigation fee for the loss of recreational facilities to the City occasioned by the changes in the land-use restrictions. The developer, however, retained the right to judicially challenge the validity of the mitigation fee. The developer also agreed that the City would obtain a lien upon the property as security for payment of the mitigation fee. The project was developed and units were subsequently sold to the public.

PROCEDURAL BACKGROUND

In his petition and complaint, the developer sought: to set aside the $280,000 mitigation fee and the $33,220 in lieu art fee; related declaratory relief; just compensation for the taking of his property; and damages for violations of his civil rights. The petition for writ of mandate was bifurcated from the balance of the complaint. On August 14, 1990, the hearing on the petition for writ of mandate was heard by the trial court. On September 6, 1990, the trial court issued its ruling on the petition. The trial court invalidated the $280,000 mitigation fee: "The stated purpose of [the $280,000 mitigation fee] is to 'replace' tennis courts no longer available in the community due to the closing of [the developer's] private tennis club. [¶] [The developer's] club (although most likely a public accommodation for civil rights purposes) was at all times private property; the [C]ity never owned any interest in it nor was any part of it ever dedicated to public use. It is conceded that [the developer] had no obligation to maintain his facility available for public use, but rather that [the developer] retained the right to exclude the public from his premises. It is true that the public accommodation laws would essentially require [the developer] to make the facilities available to the public generally so long as the premises were operated as a business, but there was no requirement that [the developer] operate the premises as a business. Instead, [the developer] was at all times free to go out of business, which he in fact did. [¶] There is . . . no reasonable relation . . . between [the developer's] project and the need for public tennis courts in [the City]. [¶] In this case, [the developer's] actions cannot legally be said to deprive the City of tennis courts,

because neither did [the developer] have an affirmative duty to provide tennis courts to the City or its residents nor would tennis courts necessarily be available to the City but for [the developer's] project. ([The developer] was at all times free to discontinue business as a tennis club, and in fact did so). The City's [$280,000 mitigation fee] is . . . simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer. [¶] The City could have condemned a portion of [the developer's] property for use as City tennis courts, but the City would then of course have had to pay for the land. Here, instead of taking land for which it would have had to pay, the City proposes to take not land but money. This is equally impermissible." The trial court found the $280,000 mitigation fee constituted an unequal tax discriminatorily applied and a taking of private property without compensation.

The trial court refused to invalidate the in lieu art fee and refused to award attorney's fees.

On December 12, 1990, the trial court modified its ruling to provide that the lien securing payment of the $280,000 mitigation fee be removed by the City no later than January 7, 1991. On January 4, 1991, the City filed its notice of appeal and a fully executed release of lien with the trial court. On January 15, 1991, the trial court again modified the judgment by declaring the lien null and void and ordering the clerk of the court to record the release of lien. On January 17, 1991, the City filed a notice of appeal from this modification of the judgment. On February 8, 1991, the trial court awarded the developer sanctions against the City pursuant to Code of Civil Procedure section 128.5 in the amount of $5,804.75 for the

City's failure to timely remove the lien. On February 25, 1991, the trial court awarded the developer costs including attorney's fees pursuant to Code of Civil Procedure section 1036 in the amount of $69,195.25. The City filed a notice of appeal from the award of costs and attorney's fees.[2]

DISCUSSION

I. The $280,000 Mitigation Fee

On September 30, 1988, the developer applied to the City for a general plan amendment, zone change, adoption of a new specific plan, tentative tract map, and design and physical development plan amendment.

After receiving the developer's applications, the City initially considered acquiring the developer's property by eminent domain. In connection with this possibility, a report was prepared for the City concerning the economic feasibility of the recreational facilities on the property. The report concluded that inconsistency of management and problems of upkeep were contributing factors to the financial problems of the facility. The report also concluded that the design concept and use of space at the facility were inefficient, inadequate, and not well-suited

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[2] We originally decided this case in a May 1993 published opinion. (*Ehrlich v. City of Culver City* (1993) 15 Cal.App.4th 1737.) On August 2, 1994, the United States Supreme Court vacated our decision and remanded the matter to us to reconsider in light of *Dolan v. City of Tigard* (June 24, 1994) ___ U.S. ___ [114 S.Ct. 2309; 129 L.Ed.2d 304].

to the current fitness market. The report further concluded: "Based on the demographics and the existing clubs in the area, we believe there is a strong market for a full scale, community family health and fitness center. The clubs that are attempting to serve this market tend to specialize or provide only a partial offering of services and activities in demand. We saw no concerted effort to tap emerging senior or children's fitness markets or overt attempt to provide services to the rapidly expanding business community. All things considered, there appears to be considerable unmet demand in the Culver City area." Finally, the report concluded that the facility could be run in an economically feasible manner if certain improvements were made to the facility.

The City initially denied the developer's applications on April 10, 1989, on the ground that the existing land-use restrictions on the property were needed by the community. The feasibility study noted that by national standards, the City had "very little open space in which to develop . . . recreational facilities," the City needed "recreational activity centers" to "maintain and enhance the 'quality of life' in [the] community." Another consultant's report noted that the "location of the facility and the surrounding demographics make[] it accessible to a sizeable population who live, work or commute through [the City] on a daily basis." Correspondence from the City's Human Services Director indicated the property had a history of community recreational use and a land-use change would negatively impact the availability, whether public or private, of community recreational facilities in the City.

The developer sought to have the City reconsider its denial and offered, as a compromise, to build four unlit tennis courts elsewhere in the City to replace the recreational facilities which might be lost on the property. The City determined that replacement costs for the recreational facilities which had been on the property were as follows: pool – $250,000 to $280,000; paddle tennis courts – $135,000 to $150,000; and tennis courts – $275,000 to $300,000. On August 28, 1989, the City adopted ordinances approving an amendment to the general plan, amending the design and physical development plan, approving the tentative tract map, and requiring the payment of a $30,000 in lieu parkland fee. The minutes of a meeting of the City Council held on August 28, 1989, state: "In addition to all other approvals recommended by the Planning Commission, a fee of $280,000.00 should be required. This fee will be used to pay for replacement of community recreational facilities which are currently provided for by the land use permitted on the subject site, which will be removed pursuant to this approval. [¶] The need for community recreational facilities has been evidenced by previous staff reports, consultant reports, and public testimony indicating the use and feasibility of such facilities at the subject site. [¶] Staff reports indicated the existing permitted recreation facilities, consisting of tennis courts, paddle tennis courts, swimming pool, running track, aerobics area, jacuzzi, sauna, and related sports club amenities, had an estimated value of at least $800,000.00. Based on the developer's estimated value of the proposed residential project of $10,000,000.00 and in lieu of imposing the developer's proposal to build four tennis courts as a condition of approval of this

project, a fee of $280,000.00 for partial replacement of the lost recreational facilities is a reasonable imposition in order to protect the public health, safety, and welfare."

On September 11, 1989, the City adopted an ordinance rezoning the property from C-3 (commercial) to R-3a (low density multiple family dwelling) and approved the new specific plan, subject to an additional condition. The ordinance provided, "Prior to issuance of any temporary or final Certificate of Occupancy for the proposed project, the developer shall pay to the City the amount of $280,000.00 to be used for additional recreational facilities as directed by the City Council."

In January 1990, the developer and the City entered into an Agreement For Lien For Developer's Fees. This agreement provided in pertinent part:

> "WHEREAS, as a condition of approval for development of the Project, and to mitigate for the loss of needed community recreational facilities existing on the Site, construction of the Project was conditioned on Developer's payment to City of fees to be used for additional recreational facilities. . . . [¶] NOW, THEREFORE, the parties . . . do hereby agree as follows: 1. Developer agrees, as a condition of issuance of the grading and building permits for the Project, to pay to City the sum of Two Hundred Eighty Thousand Dollars ($280,000.00), in accordance with the provisions of this agreement. [¶] 2. Developer shall be required to make the entire payment of $280,000.00 in cash to the City Treasurer on or prior to the date any Certificate of Occupancy for any townhouse condominium unit is issued. [¶] 3. Developer agrees to make

> the above-stated payment under protest. Nothing in this agreement shall in any way waive or restrict Developer's rights to pursue any protest Developer has made under Government Code § 66008 and by the above-mentioned lawsuit and to have a court of competent jurisdiction determine what amount, if any, should be refunded to developer. [¶] 4. City shall use said $280,000.00 only for additional recreational facilities, as directed by the City Council."

A. Unconstitutional Taking

The constitutionality of the mitigation fee must be determined under the two-prong test set forth in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 as expanded by *Dolan v. City of Tigard* (June 24, 1994) ___ U.S. ___ [114 S.Ct. 2309; 129 L.Ed.2d 304]: (1) the governmental entity could have denied the request without the denial constituting a taking; and (2) the condition imposed substantially furthers the governmental goal furthered by a denial and is roughly proportional to the impact of the proposed development. We will consider initially the first prong of the *Nollan* test.

"[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land' [citation]." (*Nollan v. California Coastal Comm'n, supra* 483 U.S. at p. 834.) Land-use regulations effect a taking and are, therefore, compensable, if the regulations compel the property owner to suffer even a minute physical invasion of his or her property or the regulations deny the owner of property "all economically beneficial or

productive use of land." (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. ___ [112 S.Ct. 2886, 2893; 120 L.Ed.2d 798].) A land-use regulation which merely deprives the owner of the property's most profitable use does not effect a taking. (*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124-138.) A regulation which deprives land of all economically beneficial use does not effect a compensable taking if "the proscribed use interests were not part of [the property owner's] title to begin with." (*Lucas v. South Carolina Coastal Council, supra,* [112 S.Ct. at p. 2899].) In determining whether land-use regulations effect a compensable taking, the owner's reasonable investment-backed expectations are to be taken into account. (*Penn Central Transp. Co. v. New York City, supra,* at p. 124.)

In this case, the developer contends the land-use regulations requiring the property to be used as community recreational facilities deprived him of all economically beneficial use of the property. He bases this contention on the evidence that he had been unable to operate the existing facility at a profit over a number of years. He argues that since the land-use restrictions deprived him of all economically beneficial use, maintaining the restrictions would have constituted a compensable taking, and, therefore, the City had no choice but to give him permission to build his luxury townhome project. These arguments are seriously flawed.

The trial court did not find that the land-use regulations to which the property was subject deprived the developer of all economically beneficial use of the property. (See, e.g., *Lucas v. South Carolina Coastal Council, supra,* ___ U.S. ___ [112 S.Ct. at p. 2890].) Nor does the

record compel such a conclusion. The mere fact that a particular property owner has not been able to make a profit from a particular recreational facility fails to establish that no community recreational facility could be operated profitably on the property. (E.g., *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. at pp. 120-122.) Property is generally deprived of all economically beneficial use where construction is banned entirely, such as when the property is required to be maintained as open space. Evidence in the record indicates a community recreational facility could be operated profitably on the property.

Moreover, the land-use regulations in question restricted the property's use at the time the developer purchased the property. (E.g., *Gilbert v. State of California* (1990) 218 Cal.App.3d 234, 256.) The land-use regulations had been placed on the property at the request of the developer's predecessor in interest. The developer purchased the property with knowledge of the restrictions and with the intent to develop the property in compliance with the restrictions as a private tennis club. Under these facts, the land-use regulations could not constitute a taking even if the property could not be operated profitably as a community recreational facility. The land-use restrictions on the property coincided with the developer's reasonable investment-backed expectations. He was not constitutionally entitled to develop the property to its most profitable use.

Accordingly, we conclude the first prong of the *Nollan* test has been met. The City was not required to approve the development project and a denial of the request would not have effected a compensable taking.

We next look to the second prong of the *Nollan* test. Conditions on approval of a project which substantially advance the same legitimate governmental purpose as a refusal to approve the project do not constitute a taking if the refusal would not have constituted a taking. (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 836.) An "essential nexus" must exist between the legitimate governmental interest and the permit condition. (*Dolan v. City of Tigard, supra,* ___ U.S. ___ [114 S.Ct. at p. 2317].) The "essential nexus" requirement prevents a governmental entity from converting a valid land-use regulation into a plan of extortion in the guise of a permit exaction. (*Ibid.*) The exaction may not be a gimmick, subterfuge or pretext to increase the general funds of the governmental entity. (Cf. *Morse v. San Luis Obispo County* (1967) 247 Cal.App.2d 600, 603.)

In *Dolan,* Dolan applied for a permit to expand her plumbing and electrical supply store. Pursuant to its Community Development Code (CDC), the City of Tigard conditioned the permit on Dolan's agreement to dedicate that portion of her property lying within the existing 100-year floodplain of an adjacent creek for the city's greenway system and an additional 15-foot strip of land for use as a pedestrian/bicycle pathway. The city planning commission concluded that the conditions were reasonably related to the projected impact of the development based on the following findings: the pathway *could* offset some of the increased traffic demand caused by the development; the larger building and paved parking area would increase the amount of impervious surfaces and runoff into the adjacent creek and thereby increase the likelihood of flooding.

The land use board of appeals relied on the planning commission's findings in upholding the validity of the two conditions. The Oregon Court of Appeals and the Oregon Supreme Court affirmed. Both courts rejected Dolan's argument that the conditions constituted an uncompensated taking of her property and held them to be reasonably related to the impact of Dolan's business expansion. The United States Supreme Court granted certiorari and reversed the Oregon Supreme Court.

In holding that the conditions were not reasonably related to the proposed development, the Supreme Court expanded the second prong of *Nollan*. The second prong requires that the permit condition substantially further the same governmental goal furthered by a denial of the permit. In other words, there must exist an " 'essential nexus' . . . between the 'legitimate state interest' and the permit condition exacted by the city." (*Dolan v. City of Tigard, supra,* ___ U.S. ___ [114 S.Ct. at p. 2317].) The Supreme Court found the "essential nexus" to exist under the facts of *Dolan*. Limiting development within the creek's floodplain would clearly serve to prevent flooding, and traffic congestion can best be eliminated by providing alternative means of transportation. (*Id.* at pp. 2317-2318.)

Upon the finding of an "essential nexus," the Supreme Court imposed an additional requirement – a determination of the degree of connection between the exactions and the projected impact of the proposed development. (*Dolan v. City of Tigard, supra,* ___ U.S. ___ [114 S.Ct. at pp. 2319-2320].) The required degree of connection is a *rough proportionality,* which is essentially a reasonable relationship test. (*Id.* at [p. 2319].) The test

requires the city to make "some sort of individualized determination that the [conditions are] related both in nature and extent to the impact of the proposed development." (*Id.* at pp. 2319-2320.)

The Supreme Court in *Dolan* did not find the required degree of connection between the permit conditions and the projected impact of the proposed development. It held that the findings were insufficient to justify the imposed conditions. A requirement that the area within the floodplain remain open and free of development would have been reasonable as it would confine the pressures on the creek caused by the proposed development. Moreover, since 15 percent of the property was already required to be left as open space, the area within the floodplain would have satisfied most of this requirement. However, the city required further that the property be used for its public greenway system. The Supreme Court held that the city's insistence on a public greenway, as opposed to a private one, had no bearing on flood control. (*Dolan v. City of Tigard, supra,* ___ U.S. ___ [114 S.Ct. at p. 2320].) The difference to Dolan, however, was "the loss of her ability to exclude others[,] . . . 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " (*Ibid.*)

The Supreme Court also held that the city had not met its burden of proving that the traffic increase caused by the development was reasonably related to the city's condition that a pathway easement be dedicated. (*Dolan v. City of Tigard, supra,* ___ U.S. ___ [114 S.Ct. at p. 2321].) The statement that traffic *could* be offset was insufficient. The city was required to quantify its findings. (*Id.* at pp. 2321-2322.)

In this case, it is beyond dispute that the City has a legitimate governmental interest in making available community recreational facilities. (Compare *Nollan v. California Coastal Comm'n, supra,* 483 U.S. 825 [Protecting visual access to the ocean]; *Dolan v. City of Tigard, supra,* ___ U.S. ___ [114 S.Ct. 2309] [prevention of flooding; reduction of traffic congestion].) The real issue in this case is whether an "essential nexus" exists between the $280,000 mitigation fee to be used to provide recreational facilities for the community and the legitimate governmental interest in making available community recreational facilities. The $280,000 mitigation fee was imposed for the express purpose of mitigating the effect of the loss of land restricted to community recreational use which would result from approval of the developer's project. The imposition of the mitigation fee was directly related to the original denial of the developer's applications for his project and was not a gimmick, subterfuge or pretext to increase the general funds of the City. Moreover, the use of the funds by the City was expressly limited to the provision of recreational facilities for the community. The governmental purpose supporting a denial of the project was the loss of community recreational facilities which would be occasioned by the luxury townhome development. The $280,000 mitigation fee substantially advanced this governmental purpose.

The developer argues that the City was not deprived of community recreational facilities by its approval of the development project, because he had already abandoned the recreational facility and was no longer in business. This argument does not withstand close scrutiny. Of course, the City could not require that the developer

operate a recreational business on the property. (Cf. *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 908-911 [restrictions on condominium conversions].) The developer was entitled to go out of business and leave his land vacant or sell it to someone else. The City could, however, require that the developer use his property, if at all, for a recreational purpose. This restriction is no different than refusing to permit apartments to be converted to condominiums. (*Ibid.*)

The developer argues further that the mitigation fee did not substantially advance the governmental purpose of providing *private* community recreational facilities, because the fee was to be used to provide *public* community recreational facilities. We do not find the distinction between public and private recreational facilities to be compelling in this instance. The property was restricted to community recreational facilities. Approval of the project deprived the community. of the opportunity for these recreational facilities. The $280,000 mitigation fee would in some measure allow the City to replace the lost recreational facilities opportunity. Whether the facilities were provided to the public in the form of a privately-owned facility or one which was owned by the public is not significant on the issue of whether the governmental purpose is the same. The City had a legitimate need for community recreational facilities whether public or private, and both the land-use restrictions and the mitigation fee served that need. Accordingly, we conclude an essential nexus existed between the land-use restrictions and the condition of approval.[3]

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[3] It is important to note that the mitigation fee was not imposed as a condition relating to the development project's

We must next determine whether the permit condition is roughly proportional, i.e., "whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development." (*Dolan v. City of Tigard, supra,* ___ U.S. ___ [114 S.Ct. at p. 2318].) Where a proposed development encroaches on existing restricted-use space (e.g., greenway, open, visual access to the ocean, recreational) requiring the developer "to provide some alternative [similar-use] space for the public either on [the developer's] property or elsewhere" is related both in nature and extent to the impact of the proposed development. (*Id.* at p. 2326.)

In this case, the proposed residential development encroached on space restricted for community recreational facilities. Thus, it would have been reasonable for the City to require the developer to provide some alternative space restricted to community recreational facilities. The City, however, did not impose an alternative restricted-use private property condition, but imposed a cash payment condition, where the cash would be used to provide public community recreational facilities.

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burden on the community for increased community services, such as community recreational facilities. (E.g., *Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463.) The mitigation fee was imposed to compensate the City for the burden on the community resulting from the loss of recreational facilities. The proper inquiry is whether the mitigation fee bears a reasonable relationship to the projected impact of rezoning, i.e., loss of recreational facilities, rather than to the projected impact of the proposed development on the need for recreational facilities.

As a general rule, a condition requiring dedication of private land to the public cannot be justified, where the governmental interest can be equally advanced by imposition of land-use restrictions on private property. (*Dolan v. City of Tigard, supra,* ___ U.S. ___ [114 S.Ct. at p. 2321] [city could not require developer to dedicate land for public greenway, where a private greenway would satisfy city's interest in flood control].) The question presented here is whether the governmental interest could have been equally advanced by requiring the developer to provide alternative similarly restricted private property.

The property in this case had been used for community recreational purposes for more than four decades. The property was apparently the only remaining property in the City zoned for commercial recreation. In order for the developer to provide alternative restricted-use private land, arduous and costly rezoning, involving public hearings, would have to be undertaken. Public recreational use, on the other hand, may take place in any zone.

In addition, it is important to recognize the peculiar legal posture in which this case arises. The developer requested certain land-use changes in order to build a condominium development on the property. The City denied the requested changes, as it had a right to do. In an effort to change the City's position on his request, the developer suggested that he build four tennis courts on some other property as a condition of approval of the project. Although the record does not expressly indicate whether these tennis courts were to be built on private or public property, circumstances imply that the tennis courts would be built by the developer at the developer's

expense on land owned by the City. It is highly unlikely that the developer intended to build private tennis courts, which he would then be required to operate, when he was so eager to abandon the recreational facilities which he had been unable to operate profitably. The cost of these proposed tennis courts was approximately $280,000.

The City accepted the developer's offer to build additional tennis courts in the form of the $280,000 mitigation fee. Thus, the City was in the position of reacting to a suggestion of the developer. The City did not unilaterally impose the $280,000 mitigation fee. Since we have concluded the City is entitled to impose some permit condition to mitigate the effect of the requested land-use change, the developer cannot now contend that the *form* of the condition, which he proposed, is invalid.

Finally, the developer argues the amount of the fee is arbitrary and excessive. The City, however, presented evidence that the value of the recreational facilities, which existed on the property prior to their removal, was $800,000. The City also presented evidence that the townhome project was valued at $10 million. In addition, the fee was related to the cost of constructing four tennis courts at another location ($275,000 to $300,000). The trial court did not find that the amount was excessive. Under these circumstances, we cannot say the fee was excessive or arbitrary. The City based the amount of fee on an individualized determination supported by quantifiable findings. We conclude the amount of the fee is roughly proportional to the impact of the land-use change.

B. Special Tax

The City contends the trial court erred in finding that the $280,000 mitigation fee constitutes a prohibited special tax. The developer responds that the $280,000 mitigation fee constituted a special tax "in the sense that the exaction constitutes an unequal tax discriminatorily applied." Pursuant to Proposition 13, a city may impose a special tax only by a two-thirds vote of the electorate. (Cal. Const., art. XIII A, § 4.) A special tax (Gov. Code, § 50075) does not include a fee which "does not exceed the reasonable cost of providing the service or the regulatory activity for which the fee is charged and which is not levied for general revenue purposes." (Gov. Code, § 50076.)

"Much has been written on the subject whether development fees are special taxes. [Citations.] Under one line of reasoning, development fees are not taxes at all since they do not bear the indicia characteristic of taxes: they are not compulsory but rather apply only to those who voluntarily choose to develop, they are not imposed upon all nonexempt properties alike, and they are not levied for the purpose of producing general revenue. [Citations.] These cases hold that development fees are in the nature of special assessments rather than taxes. Consequently, the limitations described by Article XIII A, section 4 [of the California Constitution], do not apply. [Citations.] Indeed, it stands to reason that voters could be expected to endorse the imposition of 'taxes' which only the developers would be obliged to pay. Thus, where the fees at issue are directed only at a partial segment of the population, the voting process will not necessarily validate them as 'special taxes.' [Citation.] On the other

hand there are cases holding that a development fee may be an invalid special tax absent a two-thirds vote if it exceeds the reasonable cost of providing the service for which it is charged. [Citations.]" (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 240.)

"Typically, a development fee is an exaction imposed as a precondition for the privilege of developing land, commonly enacted in order to lessen the adverse impact of increased population generated by the development. [Citation.] On the other hand, special taxes as defined in Proposition 13 (Cal. Const., art. XIII A, § 4) are 'taxes . . . levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental purposes.' [Citation.] [¶] 'One characteristic of a special tax is that it levies a fee to replace revenue for services which were affected by the reduction caused by article XIII A. [Citations.] In contrast, the [development fee] is not intended to replace revenues lost as a result of article XIII A. It is triggered by the voluntary decision of the developer to construct [the project] and is directly tied to the increase in [burdens] that this construction will possibly generate.' " (*Carlsbad Mun. Water Dist. v. OLC Corp.* (1992) 2 Cal.App.4th 479, 485-486.) "The determination of whether a particular fee is a development fee or a special tax is a question of law." (*Id.* at p. 485.)

We doubt the $280,000 mitigation fee at issue here can properly be characterized as a special tax. As noted in *Shapell Industries, Inc. v. Governing Board, supra,* 1 Cal.App.4th at p. 240, even a typical development fee does not easily come within the confines of the definition

of a special tax. The typical development fee is not compulsory; it is applicable only to those who voluntarily choose to develop their properties; it is not applicable to all property; and it is not designed to generate general revenue. The $280,000 mitigation fee is even less like a special tax than the typical development fee. A typical development fee is applicable to all who choose to develop properties. The $280,000 mitigation fee in this case has been imposed on a single developer and is a one-time nonrecurring exaction for the approval of a development. The $280,000 mitigation fee is not a special tax.

Even were we to conclude that the mitigation fee was subject to the requirements of Government Code section 50076, we would, nevertheless, conclude the mitigation fee did not constitute a special tax. As noted previously, the amount of the fee is reasonably related to the actual costs of mitigating the loss of community recreational facilities, i.e., $280,000 represents the actual cost of replacing just four tennis courts. Accordingly, the amount of the fee does not exceed the reasonable cost of providing the service for which the fee was imposed. Once again, it is important to focus on the fact that the $280,000 fee was not imposed on the developer to mitigate the increase in requests for recreational facilities resulting from his 30 townhomes. It was imposed to compensate the community for the loss of recreational facilities in the community occasioned by the change in the land-use restrictions. (Compare *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208.)

The mitigation fee also was not levied for general revenue purposes. (Cf. *Terminal Plaza Corp. v. City and County of San Francisco, supra,* 177 Cal.App.3d at pp.

906-907.) The developer argues the record establishes that the City had a preexisting need for funds for public recreational facilities, and the mitigation fee was imposed to alleviate this problem. This is not an accurate representation of the record. The mitigation fee was imposed for the sole purpose of replacing recreational facilities lost to the community as a result of the land-use changes requested by the developer; expenditure of the fee was expressly limited for this purpose. (E.g., *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 Cal.App.3d 212, 236.) The fee was not intended to replace revenue lost as a result of Proposition 13; it was triggered by the developer's voluntary decision to develop his recreational facility into a luxury townhome project; it is directly tied to the replacement of lost recreational facilities. (See, e.g., *Carlsbad Mun. Water Dist. v. OLC Corp., supra,* 2 Cal.App.4th at p. 491.) The fact that no specific plans for expenditure of the funds were adopted does not require a different result. (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 331.)

C. Equal Protection

The developer argues the $280,000 mitigation fee violates his equal protection rights. Our conclusion that the mitigation fee bears a reasonable relationship to the loss of recreational facilities occasioned by the land-use changes disposes of this claim. (*Shapell Industries, Inc. v. Governing Board, supra,* 1 Cal.App.4th at pp. 247-248; cf. *Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at p. 338.)

D. Government Code Section 66000 et seq.

Although the trial court did not reach this issue, the developer contends the mitigation fee is also invalid as a result of the City's failure to comply with Government Code section 66001. We are not persuaded by this argument. Effective January 1, 1989, the Legislature established a procedural scheme for the imposition of fees for development projects by local agencies. (Gov. Code, § 66000 et seq.) Under the statutory scheme, a development project is a "project undertaken for the purpose of development [and] includes a project involving the issuance of a permit for construction. . . . " (*Id.* at § 66000, subd. (a).) A fee is a monetary exaction which is charged by a local agency in connection with the approval of a development project for the purpose of defraying the cost of public facilities related to the development project. (*Id.* at § 66000, subd. (b).) A charter city is a local agency. (*Id.* at § 66000, subd. (c).)

When a local agency imposes fees on development projects pursuant to an initial, quasi-legislative adoption of development fees, the local agency must: (1) identify the purpose of the fee; (2) identify the use to which the fee is to be put; (3) determine how there is a reasonable relationship between the fee's use and the type of development project; and (4) determine how there is a reasonable relationship between the need for the public facility and the type of development project. (Gov. Code, § 66001, subd. (a).) When a local agency imposes a development fee on a case-by-case adjudicatory basis, the local agency must determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility attributable to the development project. (*Id.* at

§ 66001, subd. (b);[4] *Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at pp. 334-337.)

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[4] Government Code section 66001 reads as follows:

"(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall do all of the following:

"(1) Identify the purpose of the fee.

"(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

"(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

"(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

"(b) In any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

"(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 66006.

"(d) The local agency shall make findings once each fiscal year with respect to any portion of the fee remaining unexpended or uncommitted in its account five or more years after deposit of the fee to identify the purpose to which the fee is

"These requirements appear to expand slightly on the reasonable relationship test previously used by courts to test quasi-legislative action like the [City's] in this case. Having the use and purpose of the fee identified, the agency has to find a 'reasonable relationship' between the 'type' of project and both the fee's use and the need for the facility. In our case, the type of project . . . had to bear a reasonable relationship to the need for the facility and

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to be put and to demonstrate a reasonable relationship between the fee and the purpose for which it was charged. The findings required by this subdivision need only be made for moneys in the possession of the local agency and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date.

"(e) Except as provided in subdivision (f), the local agency shall refund to the then current record owner or owners of lots or units of the development project or projects on a prorated basis the unexpended or uncommitted portion of the fee, and any interest accrued thereon, for which need cannot be demonstrated pursuant to subdivision (d). A local agency may refund the unexpended or uncommitted revenues by direct payment, by providing a temporary suspension of fees, or by any other means consistent with the intent of this section. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

"(f) If the administrative costs of refunding unexpended or uncommitted revenues pursuant to subdivision (e) exceed the amount to be refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed."

the use to which the fee would be put." (*Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at p. 334.)

Here, the City found that the mitigation fee would be used to pay for replacement of community recreational facilities which had been provided by the land-use restrictions on the property, the opportunity for which recreational facilities would be lost by approval of the project. The City found that the recreational facilities which had been on the property included tennis courts, paddle tennis courts, swimming pool, running track, aerobics area, jacuzzi, and sauna. The City found that the value of the recreational facilities which had been on the property was $800,000, the value of the project was $10 million, and the replacement cost of just four tennis courts would be approximately $280,000. The $280,000 was earmarked specifically to replace community recreational facilities. These findings are adequate and reasonable.[5] As we have already concluded, the mitigation fee and its amount had a substantial nexus to the loss of recreational facilities occasioned by the approval of the development project. There is no statutory requirement that the City specifically designate the precise nature and location of the recreational facilities to be built. Adequate safeguards for the appropriate use of the mitigation fee are contained in Government Code sections 66001 [fee as condition of approval; agency requirements], 66002 [capital improvement plan; adoption; updates; hearings] and

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[5] These findings are contained in the ordinance and the minutes of the City Council meeting at which the ordinance was adopted.

66006 [local agency improvement fees; public availability of account or fund information].

II. In Lieu Art Fee

In 1988, the City adopted an ordinance to establish an Art in Public Places Program. The ordinance set forth the purpose of the program: "(a) Cultural and artistic resources enhance the quality of life for individuals living in, working in and visiting the City. [¶] (b) Balanced development of cultural and artistic resources preserves and improves the quality of the urban environment and increases real property values. [¶] (c) As development and revitalization of the real property within the City continues, the opportunity for creation of cultural and artistic resources is diminished. [¶] (d) As this development and revitalization continues as a result of market forces, urbanization of the community results. [¶] (e) As these opportunities are diminished and this urbanization occurs, the need to develop alternative sources for cultural and artistic outlets to improve the environment, image and character of the community is increased. [¶] (f) Development of cultural and artistic assets should be financed by those whose development and revitalization diminishes the availability of the community's resources for those opportunities and contributes to community urbanization. [¶] (g) Establishment of this Art in Public Places Program will promote the general welfare through balancing the community's physical growth and revitalization and its cultural and artistic resources."

The ordinance provided that certain development projects with a building valuation in excess of $500,000

and remodeling projects with a valuation in excess of $250,000 were required to participate in the Art in Public Places Program as a condition to approval of the project. Participation could take one of four forms at the option of the developer: (1) Art work could be placed on the project. The developer would select the art work subject to the City's approval, and the developer would be the owner of the art work. (2) The developer could choose to pay a fee in lieu of placing art work on the property. The in lieu art fee would be placed in a city art fund and used to purchase art work for display in the City. (3) The developer could post a bond in the amount of the fee. (4) The developer could donate art work to the City subject to the City's approval. In the latter three instances, the art work would belong to the City. The cost of the art work or the in lieu art fee was to be equal to one percent of the building valuation.

The building valuation was calculated pursuant to a formula, which in the case of this development project equalled $3,322,000. Accordingly, the art cost or in lieu art fee was determined to be $33,220. Apparently, the developer elected to pay the in lieu art fee rather than place art work on his project.

As noted previously, the trial court refused to invalidate the in lieu art fee. The trial court found: "The City's police powers extend to imposing certain requirements on construction projects. For example, so long as not to the extent of a taking, the City may specify pursuant to its police powers setbacks, amount of open space to be retained, landscaping requirements, etc. Here the City has imposed a requirement of art placement or, in lieu of art placement, a fee for art at a different location. [The

developer] has opted for the fee payment. This seems quite analogous to an in-lieu parkland fee. [¶] If the City can require landscaping or the planting of a tree on-site, could the City not allow instead as an option the funding of the planting of a tree or landscaping off-site? It seems that for [the developer] to invalidate the in-lieu art fee, [the developer] would have to establish that the City has no power to require art on the site. If it can require art on the site, then by analogy to the parkland fee, the City can instead allow payment of a fee for art off the site. [¶] The court finds the art fee within the scope of the City's police powers. . . . [The developer] may set a further hearing, if [he] so desires, regarding the question of the City's compliance with the proper procedure in specifying the use to which [the developer's] fee shall be put and the steps taken to ensure that proper use."

The developer contends the in lieu art fee must be invalidated for the following reasons: the City did not comply with Government Code section 66000 et seq.; the in lieu art fee is an illegal permit condition; the in lieu art fee is an unconstitutional special tax; and the in lieu art fee violates his first amendment right to free speech. We disagree.

First, the developer did not reserve his right to litigate the in lieu art fee. Thus, he may not accept the benefit of the City's approval of the project and also contest the validity of the conditions of approval. (*Rossco Holdings, Inc. v. State of California* (1989) 212 Cal.App.3d 642, 654-655; *McLain Western #1 v. County of San Diego* (1983) 146 Cal.App.3d 772, 776.) Second, even were we to consider imposition of the in lieu art fee on the merits, we would find it to be valid.

The Art in Public Places Program of the City is unlike typical permit conditions in many respects. On the one hand, it is very similar to landscaping, parking and lighting conditions, which require a developer to include certain design elements in a project. There can be no question that such permit conditions are legitimate exercises of a city's police powers, provided the conditions are reasonable. Ordinarily, however, these conditions cannot be met by off-site improvements or in lieu fees.

On the other hand, the in lieu art fee provision is similar to a parkland dedication requirement by which a developer must either dedicate to the local agency land for parks or pay a fee in lieu of that dedication. There is also no question that such parkland dedication requirements are valid permit conditions. (*Associated Home Builders, Etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633.) The in lieu art fee is, however, unlike an in lieu parkland fee in one very important respect. As to parklands, the developer has two options, both of which require the developer to give something to the local agency, either land or a fee. In the case of the in lieu art fee, the developer has several options. Under one option, the developer may place art valued at a certain amount on the project and the developer continues as the owner of the art. Under this option, the developer gives nothing to the City. Only if the developer chooses, may the developer donate art to the City, pay a fee in lieu, or post a bond in lieu. Under these options, the developer pays a fee to the City.

We agree with the trial court that it is within the City's police powers to require art to be placed on developments as a condition of approval. (Cf. *Agins v. City of*

Tiburon (1980) 447 U.S. 255 [scenic zoning]; *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104 [landmark preservation]; *Village of Euclid v. Ambler Co.* (1926) 272 U.S. 365 [residential zoning]; Gov. Code, § 15813 et seq. [art in public buildings].) Such a requirement does not constitute an exaction, a development fee, a taking, or a tax. We further agree with the trial court that the mere giving of an option to the developer to pay a fee in lieu of the placement of art on the project does not convert the lawful permit condition into a fee, an exaction, a tax, or a taking. Here, the developer chose to pay a fee rather than place on the project art which the developer would continue to own and which would presumably add value to the project. The developer cannot now complain of his voluntary choice to pay a fee.[6] We conclude that the fee paid by the developer in this case is not a development fee as set forth in Government Code section 66000 et seq., is not a taking of private property under *Lucas* and *Nollan,* and is not a special tax prohibited by California Constitution, article XIII A.[7]

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[6] The City's art program is an essentially legislative determination applicable to all large development projects. The in lieu art fee is not an adjudicative decision conditioning a developer's permit on an individual parcel. Accordingly, *Dolan* has no applicability. (*Dolan v. City of Tigard, supra,* ___ U.S. ___ [114 S.Ct. at p. 2314].)

[7] If we were to decide these issues under the developer's analytical framework, we would conclude that the requirements of Government Code section 66000 et seq. have been substantially complied with, the fee does not constitute a taking because it does not provide for a physical intrusion of the property and does not render the property valueless, and the fee is a voluntary nongeneral-revenue-generating development fee which does not constitute a special tax.

The developer also contends his First Amendment rights have been violated because he is required to pay a fee to the City for art which may express an opinion which the developer may find objectionable. We do not find any violation of the developer's First Amendment right to freedom of speech. First, the developer did not raise any First Amendment issues in the trial court any may not raise them for the first time on appeal. Second, as we have already noted, the developer is not required to pay a fee to the City for art. The developer could have placed art of his choosing in his project, subject only to the reasonable approval of the City. The developer could also have purchased art and donated it to the City for placement elsewhere, subject to the City's reasonable right of approval. The developer does *not* argue that such rights of approval violate his First Amendment rights. Accordingly, we do not reach this issue. If the developer elects to pay a fee instead of choosing the art, the developer may not then complain that his First Amendment right to freedom of speech has been violated by the City's right to choose art which he may not like.

Finally, we conclude the in lieu art fee did not violate the developer's right to equal protection. The developer maintains that the lack of art and cultural facilities in the City is a community-wide problem, which should not be borne solely by developers of large-scale construction projects. We disagree. There is legitimate public interest in the expansion of available art and artistic creations. (Gov. Code, § 15813.) The City's Art in Public Places Program is reasonably related to the promotion of this public interest. The required cost of the art to be placed in a project is reasonably related to the value of the project.

(Cf. Gov. Code, § 15813 ["The Legislature recognizes that other states have enacted legislation requiring the expenditure of 1 percent of funds allocated for the construction of state buildings for works of art for such buildings."].) Frequently, landscaping of a project costs between 10 and 20 percent of the project's cost. Courts have historically upheld requirements by local agencies for various on-site improvements such as landscaping, lighting, parking, storm drains, curbs and gutters, scenic views and open space. (E.g., *Agins v. City of Tiburon, supra,* 447 U.S. 255; *City and County of San Francisco v. Golden Gate Heights Investments* (1993) 14 Cal.App.4th 1203.) Art work warrants no different treatment. The requirement of the placement of art work on large-scale construction projects is reasonably related to a legitimate public purpose and rationally related to the construction itself. It is not for the judicairy to determine the wisdom, or lack of wisdom, of such a requirement. (*Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at p. 333.)[8]

III. Reinstatement of the Lien

As noted previously, in the January 8, 1990 agreement, the developer and the City agreed that the City would obtain a lien against the property as security for payment of the $280,000 mitigation fee. The City recorded such a lien on January 9, 1990. In its judgment partially

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[8] Since we have concluded that both the $280,000 mitigation fee and the in lieu art fee are valid conditions of the approval of the developer's project, we need not discuss whether the developer is entitled to attorney's fees.

granting the petition for writ of mandate dated November 8, 1990, the trial court ordered the City to set aside the $280,000 mitigation fee and remove the lien against the property. The trial court retained continuing jurisdiction over the case.

On November 15, 1990, the trial court issued a peremptory writ of mandate directing the City to take all necessary action to remove the lien and to file a return by December 17, 1990, detailing the actions taken to comply with the writ. The trial court filed a revised judgment on December 14, 1990, extending the time for removal of the lien by the City to January 7, 1991, in order to allow the city to obtain extraordinary appellate review. The trial court issued a revised peremptory writ of mandate ordering the City to take all necessary action to remove the lien by January 7, 1991. The City was also ordered to file a return to the writ by January 28, 1991.

On January 4, 1991, the City filed a notice of appeal from the December 14, 1990 revised judgment. On January 7, 1991, the City deposited with the trial court an executed but unrecorded release of the lien to be held by the trial court pending a decision on the City's appeal by this court. On January 15, 1991, the trial court ordered the court clerk to record the release of the lien. On January 17, 1991, the City filed a notice of appeal from the January 15, 1991 order of the trial court directing recordation of the release of lien. On January 25, 1991, the developer filed a notice of cross-appeal from the December 14, 1990 revised judgment. On February 11, 1991, the trial court awarded the developer sanctions against the City in the amount of $5,804.75 for the City's bad faith tactics in connection with the release of the lien. The City did not

appeal from this order. On March 20, 1991, the trial court revised the judgment to award the developer his costs and attorney's fees in the amount of $75,000. The City was given credit against this award for the amount of the sanctions previously awarded. On May 10, 1991, the City filed a notice of appeal from the revised judgment of March 20, 1991.

The City argues the trial court acted without jurisdiction when it ordered the recordation of the release of lien after the City filed a notice of appeal. We need not address this issue. It is moot. The lien has been released and has had no force and effect in the interim as to third parties. As a result of our decision finding that the $280,000 mitigation fee is valid, the City may reinstate the lien, however, only to the extent of any interest the developer has in the property at the time of the reinstatement. If the developer no longer has an interest in the property, the City is left to the normal procedures for the collection of judgments.

DISPOSITION

The judgment is reversed to the extent the trial court ordered the City to vacate the $280,000 mitigation fee and awarded the developer attorney's fees. The judgment is affirmed to the extent the trial court denied the petition for writ of mandate as to the in lieu art fee. The trial court is ordered to vacate its judgment (as revised) and to vacate the peremptory writ and enter a new and different judgment denying in full the petition for writ of mandate. There has been no appeal from the sanctions order and that order is unaffected by this appeal. The matter is

remanded to the trial court to determine whether, and to what extent, a lien on the property should be reinstated and for other further proceedings consistent with this opinion. The City is awarded its costs on appeal.

NOT TO BE PUBLISHED.

GRIGNON, Acting P.J.

I concur:

GODOY PEREZ, J.

ARMSTRONG, J. Dissenting.

I respectfully dissent from that portion of the majority opinion which determines that the City's exaction of the $280,000 mitigation fee from Erlich was constitutionally permissible.

On June 27, 1994, the Supreme Court of the United States vacated the judgment of this court and remanded this case to us for further consideration in light of *Dolan v. City of Tigard* (1994) 512 U. S. ___, [94 Daily Journal D.A.R. 8803]. Dolan requires that in evaluating Erlich's claim, "we must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and 'the permit condition exacted by the city.' " (Id. at p. 8806.) If that nexus exists, "we must then decide the required degree of connection between the exactions and the projected impact of the proposed development." The "required degree of connection" element requires us to determine "whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development." (Id. at p. 8807.) This

determination is not easily made, and "[n]o precise mathematical calculation is required"; a "rough proportionality" will suffice. (Id. at p. 8808.) However, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (Ibid.)

I do not believe this test has been met for as the majority opinion makes clear in footnote 2, the mitigation fee was not imposed as a condition relating to the nature and extent of the proposed townhouse development and the City made no determination that the development would impact in any way upon the City's recreational facilities. Thus, the mitigation fee is not constitutionally permissible.

Assuming as the majority does that the Supreme Court intended "impact of the proposed development" to mean "impact of the rezoning", I cannot find the required degree of connection between the exaction of a $280,000 fee for "recreational facilities as directed by the City Council" and a land use change which eliminates a private tennis club. The land is zoned C-3 commercial. Its use is restricted to a private tennis club by the special plan.[1] Repealing the special plan and authorizing the

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[1] I also note that the special plan which was approved by the City in 1974 guaranteed that only private tennis club activities and related uses could be performed on the property. The City chose the specific plan approach to authorize the development of the property as a private tennis club because the specific plan bound the planned use to the parcel of land. The City considered this to be important because it would

construction of townhouses on the land deprives the City only of the tennis club. No other recreation facilities are affected. Arguably, a fee to be used for the development of replacement of the lost tennis facilities would meet the "required degree of connection" test. However, a fee to be used for such recreational facilities as the City Council may in the future decide to be appropriate is nothing more than "gimmickry which converted a [possible] valid regulation of land use into 'an out-and-out plan of extortion.' " (Id. at p. 8807.) Therefore, there is no connection between the exaction of the $280,000 mitigation fee for recreational facilities and the projected impact of the development, i.e., the loss of the tennis club.

I would, therefore, affirm the judgment of the trial court in its entirety.

NOT TO BE PUBLISHED.

ARMSTRONG, J.

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protect the site against other possible C-3 uses that could be in conflict with the best interest of the neighboring residential areas and a nearby elementary school. There is nothing in the record which indicates that the City imposed the specific plan limiting the use of the property to a private tennis club in order to preserve the land for future use as a tennis club or another form of recreational facility.

APPENDIX D

1ST CASE of Level 1 printed in FULL format.

EHRLICH, RICHARD, PETITIONER V. CULVER CITY, CA, ET AL.

93-842

SUPREME COURT OF THE UNITED STATES

114 S. Ct. 2731; 1994 U.S. LEXIS 4892;
129 L. Ed. 2d 854; 62 U.S.L.W. 3860

June 27, 1994, Decided

PRIOR HISTORY: C.A. California, 2nd App. Dist.

JUDGES: Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg.

OPINION: The motion of Pacific Legal Foundation for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of Dolan v. City of Tigard, 512 U.S. (1994). Justice Blackmun, Justice Stevens, Justice Souter, and Justice Ginsburg would deny certiorari.

APPENDIX E

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD K. EHRLICH, Plaintiff and Appellant, v. THE CITY OF CULVER CITY et al., Defendants and Appellants.	)	B055523 (Super. Ct. No. C730079) (Filed May 25, 1993)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Zebrowski, Judge. Affirmed in part, reversed in part with directions.

Lisa S. Ehrlich and Edward J. Horowitz for Plaintiff and Appellant.

Pacific Legal Foundation, Ronald A. Zumbrun, Edward J. Connor, Jr. and Timothy A. Bittle as Amici Curiae on behalf of Plaintiff and Appellant.

Norman Y. Herring, City Attorney, Evelyn Keller and Carol Schwab, Deputy City Attorneys; Kane, Ballmer & Berkman, Joseph W. Pannone and Michael D. Montoya for Defendants and Appellants.

This case involves the imposition of two fees imposed on a developer by a municipality as conditions of approval of a development project: (1) a $280,000 fee to mitigate the impact of a land-use change (the mitigation fee); and (2) a $33,220 fee in lieu of a requirement that art be placed on the development project (the in lieu art fee). The City of Culver City, the City Council of Culver City and members of the City Council of Culver City (collectively the City) appeal from the judgment of the trial court issuing a writ of mandate invalidating the mitigation fee imposed by the City against Richard K. Ehrlich (the developer)[1] in exchange for approval of a 30-unit townhome development located in the City (the development project). The City contends the mitigation fee was a constitutionally permissible monetary exaction reasonably related to a legitimate public purpose. The developer contends the mitigation fee was an unconstitutional taking of his property, which did not substantially advance a legitimate public purpose directly related to the approval of the development project. The City also contends the trial court erred by releasing its lien against the developer's property and in awarding the developer attorney's fees pursuant to Code of Civil Procedure section 1036.

The developer cross-appeals from the judgment of the trial court denying his petition for writ of mandate to invalidate the imposition of a monetary exaction in the form of the in lieu art fee in exchange for approval of the development project. He also appeals from the denial of his request for attorney's fees pursuant to Government

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[1] Richard K. Ehrlich is the trustee of certain family trusts which are the actual owners of the subject property.

Code section 800 and Code of Civil Procedure section 1021.5.

FACTS

The property in question consists of 2.4 acres located at 4901 Overland Avenue in Culver City (the property). Prior to October 28, 1974, the property was owned by the developer's predecessor in interest and was split-zoned R-1 (single-family dwelling) and C-2 (retail commercial). On October 28, 1974, at the request of the developer's predecessor in interest, the zoning was changed to C-3 (commercial) and a specific plan was adopted providing for the development of a sports facility, a private tennis club and recreational facility. The developer's predecessor in interest did not develop the property, but leased it to the City for use as a little league baseball field.

In 1975, the developer purchased the vacant property. The developer subsequently improved the property and operated it as a private tennis club and recreational facility. The recreational facility included a heated swimming pool, a jacuzzi, a sauna, five tennis courts, three paddle tennis courts, a jogging track, an aerobics area, and a building with lockers, a kitchen, and other accessory uses. The estimated value of the improvements was $800,000. The private tennis club was not a financial success. In 1981, the developer applied to the City for changes to the property's land-use restrictions to permit the construction of an office building. This application was denied by the City on the ground that the existing private tennis club facility provided needed recreational facilities for the City.

On August 30, 1988, the developer closed the private tennis club and, subsequently, donated to the City much of the movable equipment associated with the tennis club.

In September 1988, the developer applied to the City for changes to the property's land-use restrictions to permit construction of 30 deluxe townhomes valued at $10 million. The City denied the application in April 1989 on the ground that the land-use restrictions provided needed recreational facilities for the City.

On July 7, 1989, the developer filed a petition for writ of mandate and complaint for damages. In the meantime, the developer sought to obtain the City's reconsideration of its denial. Apparently, the developer offered to build four tennis courts in exchange for approval of the development project. In August and September 1989, the City reconsidered its former denial and approved the development project, subject to certain conditions including the payment of the $280,000 mitigation fee, the $30,000 in lieu parkland fee, and the $33,220 in lieu art fee. On November 3, 1989, the developer amended the complaint. In January 1990, the City and the developer agreed that, in exchange for the City's approval of the development project, the developer would pay the $280,000 mitigation fee for the loss of recreational facilities to the City occasioned by the changes in the land-use restrictions. The developer, however, retained the right to judicially challenge the validity of the mitigation fee. The developer also agreed that the City would obtain a lien upon the property as security for payment of the mitigation fee.

PROCEDURAL BACKGROUND

In his petition and complaint, the developer sought: to set aside the $280,000 mitigation fee and the $33,220 in lieu art fee; related declaratory relief; just compensation for the taking of his property; and damages for violations of his civil rights. The petition for writ of mandate was bifurcated from the balance of the complaint. On August 14, 1990, the hearing on the petition for writ of mandate was heard by the trial court. On September 6, 1990, the trial court issued its ruling on the petition. The trial court invalidated the $280,000 mitigation fee: "The stated purpose of [the $280,000 mitigation fee] is to 'replace' tennis courts no longer available in the community due to the closing of [the developer's] private tennis club. [¶] [The developer's] club (although most likely a public accommodation for civil rights purposes) was at all times private property; the [C]ity never owned any interest in it nor was any part of it ever dedicated to public use. It is conceded that [the developer] had no obligation to maintain his facility available for public use, but rather that [the developer] retained the right to exclude the public from his premises. It is true that the public accommodation laws would essentially require [the developer] to make the facilities available to the public generally so long as the premises were operated as a business, but there was no requirement that [the developer] operate the premises as a business. Instead, [the developer] was at all times free to go out of business, which he in fact did. [¶] There is . . . no reasonable relation . . . between [the developer's] project and the need for public tennis courts in [the City]. [¶] In this case, [the developer's] actions cannot legally be said to deprive the City of tennis courts,

because neither did [the developer] have an affirmative duty to provide tennis courts to the City or its residents nor would tennis courts necessarily be available to the City but for [the developer's] project. ([The developer] was at all times free to discontinue business as a tennis club, and in fact did so). The City's [$280,000 mitigation fee] is . . . simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer. [¶] The City could have condemned a portion of [the developer's] property for use as City tennis courts, but the City would then of course have had to pay for the land. Here, instead of taking land for which it would have had to pay, the City proposes to take not land but money. This is equally impermissible." The trial court found the $280,000 mitigation fee constituted an unequal tax discriminatorily applied and a taking of private property without compensation.

The trial court refused to invalidate the in lieu art fee and refused to award attorney's fees.

On December 12, 1990, the trial court modified its ruling to provide that the lien securing payment of the $280,000 mitigation fee be removed by the City no later than January 7, 1991. On January 4, 1991, the City filed its notice of appeal and a fully executed release of lien with the trial court. On January 15, 1991, the trial court again modified the judgment by declaring the lien null and void and ordering the clerk of the court to record the release of lien. On January 17, 1991, the City filed a notice of appeal from this modification of the judgment. On February 8, 1991, the trial court awarded the developer sanctions against the City pursuant to Code of Civil Procedure section 128.5 in the amount of $5,804.75 for the

City's failure to timely remove the lien. On February 25, 1991, the trial court awarded the developer costs including attorney's fees pursuant to Code of Civil Procedure section 1036 in the amount of $69,195.25. The City filed a notice of appeal from the award of costs and attorney's fees.

DISCUSSION

I. The $280.000 Mitigation Fee

On September 30, 1988, the developer applied to the City for a general plan amendment, zone change, adoption of a new specific plan, tentative tract map, and design and physical development plan amendment.

After receiving the developer's applications, the City initially considered acquiring the developer's property by eminent domain. In connection with this possibility, a feasibility study was prepared for the City concerning the economic feasibility of the recreational facilities on the property. The report concluded that the inconsistency of management and problems of upkeep were contributing factors to the financial problems of the facility. The report also concluded that the design concept and use of space at the facility were inefficient, inadequate, and not well-suited to the current fitness market. The report further concluded: "Based on the demographics and the existing clubs in the area, we believe there is a strong market for a full scale, community family health and fitness center. The clubs that are attempting to serve this market tend to specialize or provide only a partial offering of services and activities in demand. We saw no concerted effort to tap emerging senior or children's fitness markets or overt

attempt to provide services to the rapidly expanding business community. All things considered, there appears to be considerable unmet demand in the Culver City area." Finally, the report concluded that the facility could be run in an economically feasible manner if certain improvements were made to the facility.

The City initially denied the developer's applications on April 10, 1989, on the ground that the existing land-use restrictions on the property were needed by the community. Correspondence from the City's Human Services Director had indicated the property had a history of community recreational use and a land-use change would negatively impact the availability, whether public or private, of community recreational facilities in the City.

The developer sought to have the City reconsider its denial and offered, as a compromise, to build four unlit tennis courts elsewhere in the City to replace the recreational facilities which might be lost on the property. The City determined that replacement costs for the recreational facilities which had been on the property were as follows: pool – $250,000 to $280,000; paddle tennis courts – $135,000 to $150,000; and tennis courts – $275,000 to $300,000. On August 28, 1989, the City adopted ordinances approving an amendment to the general plan, amending the design and physical development plan, approving the tentative tract map, and requiring the payment of a $30,000 in lieu parkland fee. The minutes of a meeting of the City Council held on August 28, 1989, state: "In addition to all other approvals recommended by the Planning Commission, a fee of $280,000.00 should be required. This fee will be used to pay for replacement of community recreational facilities which are currently

provided for by the land use permitted on the subject site, which will be removed pursuant to this approval. [¶] The need for community recreational facilities has been evidenced by previous staff reports, consultant reports, and public testimony indicating the use and feasibility of such facilities at the subject site. Staff reports indicated the existing permitted recreation facilities, consisting of tennis courts, paddle tennis courts, swimming pool, running track, aerobics area, jacuzzi, sauna, and related sports club amenities, had an estimated value of at least $800,000.00. Based on the developer's estimated value of the proposed residential project of $10,000,000.00 and in lieu of imposing the developer's proposal to build four tennis courts as a condition of approval of this project, a fee of $280,000.00 for partial replacement of the lost recreational facilities is a reasonable imposition in order to protect the public health, safety, and welfare."

On September 11, 1989, the City adopted an ordinance rezoning the property from C-3 (commercial) to R-3a (low density multiple family dwelling) and approved the new specific plan, subject to an additional condition. The ordinance provided, "Prior to issuance of any temporary or final Certificate of Occupancy for the proposed project, the developer shall pay to the City the amount of $280,000.00 to be used for additional recreational facilities as directed by the City Council."

In January 1990, the developer and the City entered into an Agreement For Lien For Developer's Fees. This agreement provided in pertinent part:

> "WHEREAS, as a condition of approval for development of the Project, and to mitigate for

the loss of needed community recreational facilities existing on the Site, construction of the Project was conditioned on Developer's payment to City of fees to be used for additional recreational facilities. . . . [¶] NOW, THEREFORE, the parties . . . do hereby agree as follows: 1. Developer agrees, as a condition of issuance of the grading and building permits for the Project, to pay to City the sum of Two Hundred Eighty Thousand Dollars ($280,000.00), in accordance with the provisions of this agreement. [¶] 2. Developer shall be required to make the entire payment of $280,000.00 in cash to the City Treasurer on or prior to the date any Certificate of Occupancy for any townhouse condominium unit is issued. [¶] 3. Developer agrees to make the above-stated payment under protest. Nothing in this agreement shall in any way waive or restrict Developer's rights to pursue any protest Developer has made under Government Code § 66008 and by the above-mentioned lawsuit and to have a court of competent jurisdiction determine what amount, if any, should be refunded to developer. [¶] 4. City shall use said $280,000.00 only for additional recreational facilities, as directed by the City Council."

A. Unconstitutional Taking

The City contends the trial court erred in finding that the $280,000 mitigation fee constitutes the unconstitutional taking of private property without just compensation. The developer responds that the $280,000 mitigation fee constitutes an illegal permit condition resulting in an unconstitutional taking of his property. Specifically, developer argues the validity of the mitigation fee must

be determined under the two-prong test set forth in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825: (1) the government agency could have denied the request without the denial constituting a taking; and (2) the condition imposed substantially furthers the government goal furthered by a denial. The developer argues that the mitigation fee does not meet either prong of this test. He asserts the denial of the specific plan amendment by the City would have constituted a taking and there is no nexus between the mitigation fee and the development project. We will consider initially the first prong of the *Nollan* test.

"[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land' [citation]." (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 834.) Land-use regulations effect a taking and are, therefore, compensable, if the regulations compel the property owner to suffer even a minute physical invasion of his or her property or the regulations deny the owner of property "all economically beneficial or productive use of land." (*Lucas v. South Carolina Coastal Council* (June 29, 1992) ___ U.S. ___ [112 S.Ct. 2886, 2893].) A land-use regulation which merely deprives the owner of the property's most profitable use does not effect a taking. (*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 125-138.) A regulation which deprives land of all economically beneficial use does not effect a compensable taking if "the proscribed use interests were not part of [the property owner's] title to begin with." (*Lucas v. South Carolina Coastal Council, supra,* [112 S.Ct. at p. 2899].) In determining whether land-use regulations

effect a compensable taking, the owner's reasonable investment-backed expectations are to be taken into account. (*Penn Central Transp. Co. v. New York City, supra,* at p. 124.)

In this case, the developer contends the land-use regulations requiring the property to be used as community recreational facilities deprived him of all economically beneficial use of the property. He bases this contention on the evidence that he had been unable to operate the existing facility at a profit over a number of years. He argues that since the land-use restrictions deprived him of all economically beneficial use, maintaining the restrictions would have constituted a compensable taking, and, therefore, the City had no choice but to give him permission to build his luxury townhome project. These arguments are seriously flawed.

First, the trial court did not find that the land-use regulations to which the property was subject deprived the developer of all economically beneficial use of the property. (See, e.g., *Lucas v. South Carolina Coastal Council, supra,* ___ U.S. ___ [112 S.Ct. at p. 2890].)

Second, the mere fact that a particular property owner has not been able to make a profit from a particular recreational facility fails to establish that no community recreational facility could be operated profitably on the property. (See, e.g., *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. at pp. 120-122.) Property is generally deprived of all economically beneficial use where construction is banned entirely, such as when the property is required to remain as open space. Evidence in the record indicates a community recreational facility

could be operated profitably on the property under certain circumstances.

Finally, the land-use regulations in question restricted the property's use at the time the developer purchased the property. (See, e.g., *Gilbert v. State of California* (1990) 218 Cal.App.3d 234, 256.) The land-use regulations had been placed on the property at the request of the developer's predecessor in interest. The developer purchased the property with knowledge of the restrictions and with the intent to develop the property as a private tennis club. Under these facts, the land-use regulations could not constitute a taking even if the property could not be operated profitably as a community recreational facility. The land-use restrictions on the property coincided with the developer's reasonable investment-backed expectations. He was not constitutionally entitled to develop the property to its most profitable use.

Accordingly, we conclude the first prong of the *Nollan* test has been met. The City was not required to approve the development project and a denial of the request would not have effected a compensable taking. We next look to the second prong of the *Nollan* test.

Conditions on approval of a project which serve the same legitimate governmental purpose as a refusal to approve the project do not constitute a taking if the refusal would not have constituted a taking. (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 836.) Where the condition on approval constitutes a physical taking of private property, the condition must substantially advance the governmental purpose and is subject to heightened scrutiny by the courts. (*Blue Jeans Equities*

West v. City and County of San Francisco (1992) 3 Cal.App.4th 164, 169-171.) Monetary exactions compelled as a condition of approval must be only rationally related to the governmental purpose. (*Id.* at p. 168 [San Francisco's Transit Impact Development Fee]; *Commercial Builders v. Sacramento* (9th Cir. 1991) 941 F.2d 872, 875 [low-income housing fee].)

The imposition of the $280,000 fee was imposed for the express purpose of mitigating the effect of the loss of land restricted to community recreational use which would result from approval of the developer's project. The imposition of the mitigation fee was directly related to the original denial of the developer's applications for his project and was not a subterfuge or pretext to increase the general funds of the City. (Cf. *Morse v. San Luis Obispo County* (1967) 247 Cal.App.2d 600, 603.) Moreover, the use of the funds by the City was expressly limited to the provision of recreational facilities for the community. The governmental purpose supporting a denial of the project was the loss of community recreational facilities which would be occasioned by the luxury townhome development. The $280,000 mitigation fee was rationally related to this governmental purpose. Even were we to find the "substantially advance/heightened scrutiny" test of *Nollan* to be applicable, we would conclude that the mitigation fee met this test. There was a substantial nexus between the land-use restriction and the condition of approval.

It is important to note that the mitigation fee was not imposed as a condition relating to the development project's burden on the community for increased community services, such as community recreational facilities. (See,

e.g., *Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463.) The mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City's approval of the townhome project and for the burden on the community resulting from the loss of recreational facilities.

The developer argues that the mitigation fee did not substantially advance the governmental purpose of providing *private* community recreational facilities, because the fee was to be used to provide *public* community recreational facilities. We do not find the distinction between public and private recreational facilities to be compelling. The property was restricted to community recreational facilities. Approval of the project deprived the community of the opportunity for these recreational facilities. The $280,000 mitigation fee would in some measure allow the City to replace the lost recreational facilities. Whether the facilities were provided to the public in the form of a privately-owned facility or one which was owned by the public is not significant on the issue of whether the governmental purpose is the same. The City had a legitimate need for community recreational facilities whether public or private, and both the land-use restriction and the mitigation fee served that same need.

The developer also argues that the City was not deprived of community recreational facilities by its approval of the development project, because he had already abandoned the recreational facility and was no longer in business. This argument does not withstand close scrutiny. Of course, the City could not require that the developer operate a recreational business on the property. (*Terminal Plaza Corp. v. City and County of San*

Francisco (1986) 177 Cal.App.3d 892, 908-911 [restrictions on condominium conversions].) Developer was entitled to go out of business and leave his land vacant or sell it to someone else. The City could, however, require that the developer use his property, if at all, for a recreational purpose. This restriction is no different than refusing to permit apartments to be converted to condominiums. (*Ibid.*)

Finally, the developer argues the amount of the fee is arbitrary and excessive. The City, however, presented evidence that the value of the recreational facilities, which existed on the property prior to their removal, was $800,000. The City also presented evidence that the town-home project was valued at $10 million. In addition, the fee was related to the cost of constructing four tennis courts at another location ($275,000 to $300,000). The trial court did not find that the amount was excessive. Under these circumstances, we cannot say the fee was excessive or arbitrary.

B. Special Tax

The City contends the trial court erred in finding that the $280,000 mitigation fee constitutes a prohibited special tax. The developer responds that the $280,000 mitigation fee constituted a special tax "in the sense that the exaction constitutes an unequal tax discriminatorily applied." Pursuant to Proposition 13, a city may impose a special tax only by a two-thirds vote of the electorate. (Cal. Const., art. XIII A, § 4.) A special tax (Gov. Code, § 50075) does not include a fee which "does not exceed

the reasonable cost of providing the service or the regulatory activity for which the fee is charged and which is not levied for general revenue purposes." (Gov. Code, § 50076.)

"Much has been written on the subject whether development fees are special taxes. [Citations.] Under one line of reasoning, development fees are not taxes at all since they do not bear the indicia characteristic of taxes: they are not compulsory but rather apply only to those who voluntarily choose to develop, they are not imposed upon all nonexempt properties alike, and they are not levied for the purpose of producing general revenue. [Citations.] These cases hold that development fees are in the nature of special assessments rather than taxes. Consequently, the limitations described by Article XIII A, section 4 [of the California Constitution], do not apply. [Citations.] Indeed, it stands to reason that voters could be expected to endorse the imposition of 'taxes' which only the developers would be obliged to pay. Thus, where the fees at issue are directed only at a partial segment of the population, the voting process will not necessarily validate them as 'special taxes.' [Citation.] On the other hand there are cases holding that a development fee may be an invalid special tax absent a two-thirds vote if it exceeds the reasonable cost of providing the service for which it is charged. [Citations.]" (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 240.)

"Typically, a development fee is an exaction imposed as a precondition for the privilege of developing land, commonly enacted in order to lessen the adverse impact of increased population generated by the development. [Citation.] On the other hand, special taxes as defined in

Proposition 13 (Cal. Const., art. XIII A, § 4) are 'taxes . . . levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental purposes.' [Citation.] [¶] 'One characteristic of a special tax is that it levies a fee to replace revenue for services which were affected by the reduction caused by article XIII A. [Citations.] In contrast, the [development fee] is not intended to replace revenues lost as a result of article XIII A. It is triggered by the voluntary decision of the developer to construct [the project] and is directly tied to the increase in [burdens] that this construction will possibly generate.' " (*Carlsbad Mun. Water Dist. v. OLC Corp.* (1992) 2 Cal.App.4th 479, 485-486.) "The determination of whether a particular fee is a development fee or a special tax is a question of law." (*Id.* at p. 485.)

We doubt the $280,000 mitigation fee at issue here can properly be characterized as a special tax. As noted in *Shapell Industries, Inc. v. Governing Board, supra,* 1 Cal.App.4th at p. 240, even a typical development fee does not easily come within the confines of the definition of a special tax. The typical development fee is not compulsory; it is applicable only to those who voluntarily choose to develop their properties; it is not applicable to all property; and it is not designed to generate general revenue. The $280,000 mitigation fee is even less like a special tax than the typical development fee. A typical development fee is applicable to all who choose to develop properties. The $280,000 mitigation fee in this case has been imposed on a single developer and is a one-time nonrecurring exaction for the approval of a development. The $280,000 mitigation fee is not a special tax.

Even were we to conclude that the mitigation fee was subject to the requirements of Government Code section 50076, we would, nevertheless, conclude the mitigation fee did not constitute a special tax. As noted previously, the amount of the fee is reasonably related to the actual costs of mitigating the loss of community recreational facilities, i.e., $280,000 represents the actual cost of replacing just four tennis courts. Accordingly, the amount of the fee does not exceed the reasonable cost of providing the service for which the fee was imposed. Once again, it is important to focus on the fact that the $280,000 fee was not imposed on the developer to mitigate the increase in requests for recreational facilities resulting from his 30 townhomes. It was imposed to compensate the community for the loss of recreational facilities in the community occasioned by the change in the land-use restrictions. (Compare *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208.)

The mitigation fee also was not levied for general revenue purposes. (*Terminal Plaza Corp. v. City and County of San Francisco, supra,* 177 Cal.App.3d at pp. 906-907.) The developer argues the record establishes that the City had a preexisting need for funds for public recreational facilities, and the mitigation fee was imposed to alleviate this problem. This is not an accurate representation of the record. The mitigation fee was imposed for the sole purpose of replacing recreational facilities lost to the community as a result of the land-use changes requested by the developer; expenditure of the fee was expressly limited for this purpose. (See, e.g., *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 Cal.App.3d 212, 236.) The fee was not intended to replace revenue lost as a result of

Proposition 13; it was triggered by the developer's voluntary decision to develop his recreational facility into a luxury townhome project; it is directly tied to the replacement of lost recreational facilities. (See, e.g., *Carlsbad Mun. Water Dist. v. QLC Corp., supra,* 2 Cal.App.4th at p. 491.) The fact that no specific plans for expenditure of the funds were adopted does not require a different result. (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 331.)

C. Equal Protection

The developer argues the $280,000 mitigation fee violates his equal protection rights. Our conclusion that the mitigation fee bears a reasonable relationship to the loss of recreational facilities occasioned by the land-use changes disposes of this claim. (*Shapell Industries, Inc. v. Governing Board, supra,* 1 Cal.App.4th at pp. 247-248; cf. *Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at p. 338.)

D. Government Code Section 66000 et seq.

Although the trial court did not reach this issue, the developer contends the mitigation fee is also invalid as a result of the City's failure to comply with Government Code section 66001. We are not persuaded by this argument. Effective January 1, 1989, the Legislature established a procedural scheme for the imposition of fees for development projects by local agencies. (Gov. Code, § 66000 et seq.) Under the statutory scheme, a development project is a "project undertaken for the purpose of

development [and] includes a project involving the issuance of a permit for construction. . . . " (*Id.* at § 66000, subd. (a).) A fee is a monetary exaction which is charged by a local agency in connection with the approval of a development project for the purpose of defraying the cost of public facilities related to the development project. (*Id.* at § 66000, subd. (b).) A charter city is a local agency. (*Id.* at § 66000, subd. (c).)

When a local agency imposes fees on development projects pursuant to an initial, quasi-legislative adoption of development fees, the local agency must: (1) identify the purpose of the fee; (2) identify the use to which the fee is to be put; (3) determine how there is a reasonable relationship between the fee's use and the type of development project; and (4) determine how there is a reasonable relationship between the need for the public facility and the type of development project. (Gov. Code, § 66001, subd. (a).) When a local agency imposes a development fee on a case-by-case adjudicatory basis, the local agency must determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility attributable to the development project. *Id.* at § 66001, subd. (b).)[2] (*Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at pp. 334-337.)

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[2] Government Code section 66001 reads as follows:

"(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall do all of the following:

"(1) Identify the purpose of the fee.

"(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a

"These requirements appear to expand slightly on the reasonable relationship test previously used by courts

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capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

"(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

"(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

"(b) In any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

"(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 66006.

"(d) The local agency shall make findings once each fiscal year with respect to any portion of the fee remaining unexpended or uncommitted in its account five or more years after deposit of the fee to identify the purpose to which the fee is to be put and to demonstrate a reasonable relationship between the fee and the purpose for which it was charged. The findings required by this subdivision need only be made for moneys in the possession of the local agency and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date.

"(e) Except as provided in subdivision (f), the local agency shall refund to the then current record owner or owners of lots or units of the development project or projects on a prorated basis the unexpended or uncommitted portion of the fee, and any interest accrued thereon, for which need cannot be demonstrated pursuant to subdivision (d). A local agency may

to test quasi-legislative action like the [City's] in this case. Having the use and purpose of the fee identified, the agency has to find a 'reasonable relationship' between the 'type' of project and both the fee's use and the need for the facility. In our case, the type of project . . . had to bear a reasonable relationship to the need for the facility and the use to which the fee would be put." (*Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at p. 334.)

Here, the City found that the mitigation fee would be used to pay for replacement of community recreational facilities which had been provided for by the land-use restrictions on the property, the opportunity for which recreational facilities would be lost by approval of the project. The City found that the recreational facilities which had been on the property included tennis courts, paddle tennis courts, swimming pool, running track, aerobics area, jacuzzi, and sauna. The City found that the value of the recreational facilities which had been on the property was $800,000, the value of the project was $10

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refund the unexpended or uncommitted revenues by direct payment, by providing a temporary suspension of fees, or by any other means consistent with the intent of this section. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

"(f) If the administrative costs of refunding unexpended or uncommitted revenues pursuant to subdivision (e) exceed the amount to be refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed."

million, and the replacement cost of just four tennis courts would be approximately $280,000. The $280,000 was earmarked specifically to replace community recreational facilities. These findings are adequate and reasonable.[3] As we have already concluded, the mitigation fee and its amount had a substantial nexus to the loss of recreational facilities occasioned by the approval of the development project. There is no statutory requirement that the City specifically designate the precise nature and location of the recreational facilities to be built. Adequate safeguards for the appropriate use of the mitigation fee are contained in Government Code sections 66001 [fee as condition to approval; agency requirements], 66002 [capital improvement plan; adoption; updates; hearings] and 66006 [local agency improvement fees; public availability of account or fund information].

II. In Lieu Art Fee

In 1988, the City adopted an ordinance to establish an Art in Public Places Program. The ordinance set forth the purpose of the program: "(a) Cultural and artistic resources enhance the quality of life for individuals living in, working in and visiting the City. [¶] (b) Balanced development of cultural and artistic resources preserves and improves the quality of the urban environment and increases real property values. [¶] (c) As development and revitalization of the real property within the City continues, the opportunity for creation of cultural and

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[3] These findings are contained in the ordinance and the minutes of the City Council meeting at which the ordinance was adopted.

artistic resources is diminished. [¶] (d) As this development and revitalization continues as a result of market forces, urbanization of the community results. [¶] (e) As these opportunities are diminished and this urbanization occurs, the need to develop alternative sources for cultural and artistic outlets to improve the environment, image and character of the community is increased. [¶] (f) Development of cultural and artistic assets should be financed by those whose development and revitalization diminishes the availability of the community's resources for those opportunities and contributes to community urbanization. [¶] (g) Establiishment of this Art in Public Places Program will promote the general welfare through balancing the community's physical growth and revitalization and its cultural and artistic resources."

The ordinance provided that certain development projects with a building valuation in excess of $500,000 and remodeling projects with a valuation in excess of $250,000 were required to participate in the Art in Public Places Program as a condition to approval of the project. Participation could take one of four forms at the option of the developer: (1) Art work could be placed on the project. The developer would select the art work subject to the City's approval, and the developer would be the owner of the art work. (2) The developer could choose to pay a fee in lieu of placing art work on the property. The in lieu art fee would be placed in a city art fund and used to purchase art work for display in the City. (3) The developer could post a bond in the amount of the fee. (4) The developer could donate art work to the City subject to the City's approval. In the latter three instances, the art work would belong to the City. The cost of the art work

or the in lieu art fee was to be equal to one percent of the building valuation.

The building valuation was calculated pursuant to a formula, which in the case of this development project equalled $3,322,000. Accordingly, the art cost or in lieu art fee was determined to be $33,220. Apparently, the developer elected to pay the in lieu art fee rather than place art work on his project.

As noted previously, the trial court refused to invalidate the in lieu art fee. The trial court found: "The City's police powers extend to imposing certain requirements on construction projects. For example, so long as not to the extent of a taking, the City may specify pursuant to its police powers setbacks, amount of open space to be retained, landscaping requirements, etc. Here the City has imposed a requirement of art placement or, in lieu of art placement, a fee for art at a different location. [The developer] has opted for the fee payment. This seems quite analogous to an in-lieu parkland fee. [¶] If the City can require landscaping or the planting of a tree on-site, could the City not allow instead as an option the funding of the planting of a tree or landscaping off-site? It seems that for [the developer] to invalidate the in-lieu art fee, [the developer] would have to establish that the City has no power to require art on the site. If it can require art on the site, then by analogy to the parkland fee, the City can instead allow payment of a fee for art off the site. [¶] The court finds the art fee within the scope of the City's police powers. . . . [The developer] may set a further hearing, if [he] so desires, regarding the question of the City's compliance with the proper procedure in specifying the use to

which [the developer's] fee shall be put and the steps taken to ensure that proper use."

The developer contends the in lieu art fee must be invalidated for the following reasons: the City did not comply with Government Code section 66000 et seq.; the in lieu art fee is an illegal permit condition; the in lieu art fee is an unconstitutional special tax; and the in lieu art fee violates his first amendment right to free speech.

The Art in Public Places Program of the City is unlike typical permit conditions in many respects. On the one hand, it is very similar to landscaping, parking, and lighting conditions, which require a developer to include certain design elements in a project. There can be no question that such permit conditions are legitimate exercises of a city's police powers, provided the conditions are reasonable. Ordinarily, however, these conditions cannot be met by off-site improvements or in lieu fees.

On the other hand, the in lieu art fee provision is similar to a parkland dedication requirement by which a developer must either dedicate to the local agency land for parks or pay a fee in lieu of that dedication. There is also no question that such parkland dedication requirements are valid permit conditions. (*Associated Home Builders, Etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633.) The in lieu art fee is, however, unlike an in lieu parkland fee in one very important respect. As to parklands, the developer has two options, both of which require the developer to give something to the local agency, either land or a fee. In the case of the in lieu art fee, the developer has several options. Under one option, the developer may place art valued at a certain amount

on the project and the developer continues as the owner of the art. Under this option, the developer gives nothing to the City. Only if the developer chooses, may the developer donate art to the City, pay a fee in lieu, or post a bond in lieu. Under these options, the developer pays a fee to the City.

We agree with the trial court that it is within the City's police powers to require art to be placed on developments as a condition of approval. (Cf. *Agins v. City of Tiburon* (1980) 447 U.S. 255 [scenic zoning]; *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104 [landmark preservation]; *Euclid v. Ambler Co.* (1926) 272 U.S. 365 [residential zoning]; Gov. Code, § 15813 et seq. [art in public buildings].) Such a requirement does not constitute an exaction, a development fee, a taking, or a tax. We further agree with the trial court that the mere giving of an option to the developer to pay a fee in lieu of the placement of art on the project does not convert the lawful permit condition into a fee, an exaction, a tax, or a taking. Here, the developer chose to pay a fee rather than place on the project art which the developer would continue to own and which would presumably add value to the project. The developer cannot now complain of his voluntary choice to pay a fee. We conclude that the fee paid by the developer in this case is not a development fee as set forth in Government Code section 66000 et seq., is not a taking of private property under *Lucas* and *Nollan,* and is not a special tax prohibited by California Constitution, article XIII A.[4]

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[4] If we were to decide these issues under the developer's analytical framework, we would conclude that the requirements

We also do not find any violation of the developer's first amendment right to freedom of speech. The developer contends his first amendment rights have been violated because he is required to pay a fee to the City for art which may express an opinion which the developer may find objectionable. As we have already noted, the developer is not required to pay a fee to the City for art. The developer could have placed art of his choosing in his project, subject only to the reasonable approval of the City. The developer could also have purchased art and donated it to the City for placement elsewhere, subject to the City's reasonable right of approval. The developer does not argue that such rights of approval violate his first amendment rights. If the developer elects to pay a fee instead of choosing the art, the developer may not then complain that his first amendment right to freedom of speech has been violated.

Finally, we conclude the in lieu art fee did not violate the developer's right to equal protection. The developer maintains that the lack of art and cultural facilities in the City is a community-wide problem, which should not be borne solely by developers of large-scale construction projects. We disagree. There is legitimate public interest in the expansion of available art and artistic creations. (Gov. Code, § 15813.) The City's Art in Public Places Program is reasonably related to the promotion of this

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of Government Code section 66000 et seq. were substantially complied with, the fee does not constitute a taking because it did not provide for a physical intrusion of the property and did not render the property valueless, and the fee is a voluntary nongeneral-revenue-generating development fee which did not constitute a special tax.

public interest. The required cost of the art to be placed in a project is reasonably related to the value of the project. (Cf. Gov. Code, § 15813 ["The Legislature recognizes that other states have enacted legislation requiring the expenditure of 1 percent of funds allocated for the construction of state buildings for works of art for such buildings."].) Frequently, landscaping of a project costs between 10 and 20 percent of the project's cost. Courts have historically upheld requirements by local agencies for various on-site improvements such as landscaping, lighting, parking, storm drains, curbs and gutters, scenic views, and open space. (E.g., *Agins v. City of Tiburon, supra,* 447 U.S. 255; *City and County of San Francisco v. Golden Gate Heights Investments* (March 3, 1993 A055754) ___ Cal.App.4th ___, [93 Daily Journal D.A.R. 4281].) Artwork warrants no different treatment. The requirement of the placement of art work on large-scale construction projects is reasonably related to a legitimate public purpose and rationally related to the construction itself. It is not for the judiciary to determine the wisdom of such a requirement. (*Garrick Development Co. v. Hayward Unified School Dist., supra,* 3 Cal.App.4th at p. 333.)[5]

III. Reinstatement of the Lien

As noted previously, in the January 8, 1990 agreement, the developer and the City agreed that the City would obtain a lien against the property as security for

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[5] Since we have concluded that both the $280,000 mitigation fee and the in lieu art fee are valid conditions of the approval of the developer's project, we need not discuss whether the developer is entitled to attorney's fees.

payment of the $280,000 mitigation fee. The City recorded such a lien on January 9, 1990. In its judgment partially granting the petition for writ of mandate dated November 8, 1990, the trial court ordered the City to set aside the $280,000 mitigation fee and remove the lien against the property. The trial court retained continuing jurisdiction over the case.

On November 15, 1990, the trial court issued a peremptory writ of mandate directing the City to take all necessary action to remove the lien and to file a return by December 17, 1990, detailing the actions taken to comply with the writ. The trial court filed a revised judgment on December 14, 1990, extending the time for removal of the lien by the City to January 7, 1991, in order to allow the City to obtain extraordinary appellate review. The trial court issued a revised peremptory writ of mandate ordering the City to take all necessary action to remove the lien by January 7, 1991. The City was also ordered to file a return to the writ by January 28, 1991.

On January 4, 1991, the City filed a notice of appeal from the December 14, 1990 revised judgment. On January 7, 1991, the City deposited with the trial court an executed but unrecorded release of the lien to be held by the trial court pending a decision on the City's appeal by this court. On January 15, 1991, the trial court ordered the court clerk to record the release of the lien. On January 17, 1991, the City filed a notice of appeal from the January 15, 1991 order of the trial court directing recordation of the release of lien. On January 25, 1991, the developer filed a notice of cross-appeal from the December 14, 1990 revised judgment. On February 11, 1991, the trial court awarded the developer sanctions against the City in the

amount of $5,804.75 for the City's bad faith tactics in connection with the release of the lien. The City did not appeal from this order. On March 20, 1991, the trial court revised the judgment to award the developer his costs and attorney's fees in the amount of $75,000. The City was given credit against this award for the amount of the sanctions previously awarded. On May 10, 1991, the City filed a notice of appeal from the revised judgment of March 20, 1991.

The City argues the trial court acted without jurisdiction when it ordered the recordation of the release of lien after the City filed a notice of appeal. We need not address this issue. That issue is moot. The lien has been released and has had no force and effect in the interim as to third parties. As a result of our decision finding that the $280,000 mitigation fee is valid, the City may reinstate the lien, however, only to the extent of any interest the developer has in the property at the time of the reinstatement. If the developer no longer has an interest in the property, the City is left to the normal procedures for the collection of judgments.

DISPOSITION

The judgment is reversed to the extent the trial court ordered the City to vacate the $280,000 mitigation fee and awarded the developer attorney's fees. The judgment is affirmed to the extent the trial court denied the petition for writ of mandate as to the in lieu art fee. The trial court is ordered to vacate its judgment (as revised) and to vacate the peremptory writ and enter a new and different judgment denying in full the petition for writ of mandate.

There has been no appeal from the sanctions order and that order is unaffected by this appeal. The matter is remanded to the trial court to determine whether, and to what extent, a lien on the property should be reinstated and for other further proceedings consistent with this opinion. The City is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION.

GRIGNON, Acting P.J.

We concur:

BOREN, J.*

JACKSON, J.*

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* Assigned by the Chairperson of the Judicial Council.

APPENDIX F

Second Appellate District, Division Five, No. B055523
S033642

IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA

IN BANK

RICHARD K. EHRLICH, Appellant

v.

THE CITY OF CULVER CITY Et Al., Appellants

(Filed Aug. 26, 1993)

Petition for review DENIED.

Panelli, J. is of the opinion the petition should be granted. The request for an order directing depublication of the opinion is denied.

Lucas
Chief Justice

APPENDIX G

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

RICHARD K. EHRLICH, etc., Petitioner, Respondent and Cross-Appellant, v. CITY OF CULVER CITY, et al., Respondents, Appellants, and Cross-Respondents.	)))))))))	2d Civil No. B055523 (Super. Ct. No. C730079) (Filed Jan. 25, 1993)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Zebrowski, Judge. Affirmed.

Norman Y. Herring, City Attorney, Evelyn Keller and Carol Schwab, Deputy City Attorneys; Kane, Ballmer & Berkman, Joseph W. Pannone and Michael D. Montoya for Respondents, Appellants and Cross-Respondents.

Lisa S. Ehrlich, Edward J. Horowitz for Petitioner, Respondent and Cross-Appellant.

Pacific Legal Foundation, Ronald A. Zumbrun, Edward J. Connor, Jr. and Timothy A. Bittle as Amicus Curiae on behalf of Petitioner, Respondent and Cross-Appellant.

Appellants, the City of Culver City and the city council of the City of Culver City (City), appeal the trial court's

invalidation of a development exaction, release of a lien to secure payment of that exaction and an award of attorney's fees pursuant to Code of Civil Procedure section 1036.[1]

Cross-appellant Richard K. Ehrlich (Ehrlich), appeals from the imposition of a monetary exaction in the form of an "in lieu art in public places fee" as a condition for issuance of the final certificate of occupancy for a 30-unit town home development located in Culver City, California. In addition, Ehrlich appeals from the denial of attorney's fee request pursuant to Government Code section 800 and Code of Civil Procedure section 1021.5.[2]

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[1] Code of Civil Procedure section 1036 provides as follows: "In any inverse condemnation proceeding brought for the taking of any interest in real property, the court rendering judgment for the plaintiff by awarding compensation for such taking, or the attorney representing the public entity who effects a settlement of such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding."

[2] Government Code section 800 provides as follows: "In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any provision of state law, except actions resulting from actions of the State Board of Control, where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, computed at one hundred dollars ($100) per hour, but not to exceed seven thousand five hundred dollars ($7,500), where he or she is

FACTS AND PROCEDURAL BACKGROUND

Ehrlich is trustee of the 1985 Ehrlich Family Trust and the July 28, 1965 Trust, which are the owners of the property located at 4901 Overland Avenue, Culver City, California. In 1975, Ehrlich purchased the vacant parcel. The former owner had leased the land to the city for use as a little league baseball field.

The City had zoned the parcel C-3 which included all of the uses permitted in the R-3(a) zone, specifically multifamily development and condominiums. The City, however, had previously adopted a specific plan which allowed the development of the parcel only as a recreational facility.

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personally obligated to pay the fees, from the public entity, in addition to any other relief granted or other costs awarded. [¶] This section is ancillary only, and shall not be construed to create a new cause of action. [¶] Refusal by a public entity or officer thereof to admit liability pursuant to a contract of insurance shall not be considered arbitrary or capricious action or conduct within the meaning of this section."

Code of Civil Procedure section 1021.5 provides as follows: "Upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

Ehrlich developed the property and it was operated as a private tennis club and recreational facility continuously through August 1988. Between the time of its development and its closure in 1988, the facility was operated by five different managers, none of whom could make a business at that site profitable.

In 1981, Ehrlich requested changes to the land use restrictions to permit an office building development on the property. This request was reviewed by the City's planning commission which recommended against the change even though the commercial office building would have been consistent with the then existing C-3 zoning of that property. The request was denied by the planning commission on the grounds that the existing private tennis club facility provided needed recreational facilities for the City. Ehrlich did not pursue this request any further.

On August 30, 1988, Ehrlich closed the private tennis club as a result of continuing financial losses. After the closure of the club, and before the facility was demolished, Ehrlich donated all of the still useful club equipment to the City, including the tennis court lights, nets, lockers, and other equipment.

In 1988, Ehrlich requested changes to the land use restrictions to permit the development of 32 deluxe condominiums. The planning commission recommended approval. On April 10, 1989, the city council disapproved the changes after determining that the existing community recreational land use restrictions were needed by the community.

During the period between Ehrlich's submission of the project in September 1988 and the disapproval of the project in April 1989, the City studied the feasibility of purchasing the property for use as a public recreational facility. The City decided not to purchase the property from Ehrlich. The City also decided that it would be impossible to operate the site as a recreational facility in an economically and environmentally viable manner.

After the disapproval, Ehrlich entered into negotiations with the City in an effort to determine what conditions might be acceptable in exchange for approval of the project. Ehrlich was informed that his project would not be approved unless he agreed to pay for or build new public recreational facilities for the City.

The city council agreed to reconsider the disapproval at its August 14, 1989 meeting. The City council voted to approve the planning commission's March 8, 1989 recommendation and allow Ehrlich to build 30 deluxe condominiums. The approval included the condition that Ehrlich pay a $30,000 in-lieu park land fee pursuant to the City's Municipal Code section 33-E.l. The approval was also conditioned upon Ehrlich paying two additional fees. The first was the $280,000 fee for mitigation of the loss of needed community recreational facilities. The money was to be used solely for the construction of replacement community recreational facilities. The second fee was for $33,220 to go into the City's "art in public places" fund.

On November 3, 1989, Ehrlich filed an amended complaint for writ of mandate and complaint for declaratory relief. On January 8, 1990, Ehrlich and the City executed

an agreement whereby Ehrlich would pay the mitigation fee and allow recordation of a lien to secure payment. As a result, Ehrlich was permitted to obtain building permits and commence construction of the condominiums.

On August 14, 1990, the hearing on the petition for writ of mandate was brought before the trial court. On September 6, 1990, the trial court issued its ruling invalidating the $280,000 exaction.

On November 8, 1990, a partial judgment was entered ordering the City to remove the $280,000 lien "immediately." The peremptory writ of mandate commanding said release of lien was issued on November 19, 1990.

The City moved to set aside the partial judgment and requested a new trial. On December 12, 1990, the court issued its ruling denying the City's motion to set aside the judgment as to the mitigation fee and modified the judgment to provide that the lien be removed no later than January 7, 1991. On December 14, 1990, the revised partial judgment was entered ordering the City to release the lien against the property by January 7, 1991 (Judgment No. 1). A revised peremptory writ of mandate was issued on December 27, 1990.

On January 4, 1991, the City filed a notice of appeal and, on January 7, 1991, an executed release of lien with the superior court pursuant to Code of Civil Procedure section 917.3.[3] On January 9, 1991, Ehrlich brought an ex

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[3] Code of Civil Procedure section 917.3 provides as follows: "The perfecting of an appeal shall not stay enforcement of the

parte motion for an order to record release of lien and contempt of court for disobeying the writ.

On January 15, 1991, the trial court executed a modification to the revised partial judgment declaring the lien null and void (Judgment No. 2) and an order directing the court clerk to record the release of lien. On January 17, 1991, the City filed a notice of appeal from Judgment No. 2.

On January 30, 1991, Ehrlich filed a notice of cross appeal.

On February 8, 1991, the trial court awarded Ehrlich sanctions in the amount of $5,804.75 because the City had not removed the lien by January 7, 1991. On February 25, 1991, the trial court awarded Ehrlich costs, including attorney's fees, pursuant to Code of Civil Procedure section 1036 in the amount of $69,195.25 ($75,000 minus the amount the City paid in sanctions).

On March 20, 1991, the trial court entered a second modification to revised partial judgment (Judgment No. 3) awarding costs as sought. On May 10, 1991, the City filed an appeal of Judgment No. 3.

Since the primary issues involved in this case involve questions of law, the court may conduct an independent review of the facts and unbounded by the trial court's

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judgment or order in the trial court if the judgment or order appealed from directs the execution of one or more instruments unless the instrument or instruments are executed and deposited in the office of the clerk of the court where the original judgment or order is entered to abide the order of the reviewing court."

determination as to those issues. (*Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, 1216.)

DISCUSSION

A. The $280.000 Exaction

The City required Ehrlich to pay $280,000 as a condition to obtaining a building permit to develop his property into 30 condominium units. We find this exaction impermissible under the law.

The argument that the City needed the $280,000 fee to mitigate the loss of needed community recreational facilities is misplaced. The private facility of Ehrlich had been shut down prior to the determination that the City needed Ehrlich to pay a substantial sum of money to compensate the City for the loss of recreational facilities that were not being used by the community. In effect, what the City was attempting to do was to force Ehrlich to reopen a business that had lost money for approximately 15 years under numerous managers. Certainly the government cannot force landowners to use their property for a particular type of business. (*Department of Public Works v. San Diego* (1932) 122 Cal.App. 159) In addition, the right not to be forced to use land for a particular business includes the right to go out of business. In *Robinson v. Diamond Housing Corporation* (D.C. Cir. 1972) 463 F.2d 853, the court stated as follows: "There would be severe constitutional problems with a rule of law which required an entrepreneur to remain in business against his will." (*Id.* at p. 867.) We believe the City is in error when it requires the specific business that may be operated on Ehrlich's land, or that it had a right to the

continued use of Ehrlich's land as a recreational facility even at a loss to its owner.

In *Agins v. City of Tiburon (Agins I)* (1979) 24 Cal.3d 266, 277, the court stated that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property. In *Agins v. Tiburon (Agins II)* (1980) 447 U.S. 255, 260-261, the Supreme Court held that the application of a general zoning law to particular property effects a taking if it denies an owner economically viable use of his land.

The facts are clear that Ehrlich was denied an economically viable use of his land without the zone change. Between the time of Ehrlich's purchase of the property and its closure in 1988, the facility was operated by five different managers, without making the legally zoned business profitable. The City conducted a feasibility study and in the report dated March 29, 1989, determined that it was extremely doubtful that the facility could operate on a break-even or profitable basis without more indoor space and amenities. The report also stated that if the facility was upgraded and substantial money spent, it could make a profit if there were 5,000 members, significantly more members than ever belonged during Ehrlich's 15 years of ownership.

The City certainly could have taken Ehrlich's property under eminent domain laws and paid Ehrlich fair compensation. The City could then have legitimately used the property for recreational purposes. However, it appears that the City attempted to exact an unfair price

from one developer to help finance the City's recreational facilities.

The trial court relied on *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 and *Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463 in determining that the $280,000 exaction was not valid.

The case of *Nollan v. California Coastal Comm'n, supra,* 483 U.S. 825 involved a permit application to demolish a small bungalow, totaling 504 square feet and replace it with a larger two-story house on a privately held ocean-front lot. The new three-bedroom house would be in keeping with the rest of the neighborhood. The coastal commission found that a new house would block public views of the ocean from an inland vantage point. The commission attempted to require the Nollans to dedicate an easement allowing public use of their private beach on the ocean side of their house. (*Id.* at p. 828.)

The Supreme Court established a two-step nexus for land use exactions tied to government approvals. First, the Court requires that the circumstance of the application must be such that the government agency could deny the proposed request altogether without that denial being a taking. (*Id.* at p. 835.) In *Nollan,* the Court assumed, without deciding the issue, that this criteria was met under the facts (protecting public views was a legitimate justification for banning the Nollans' project). Second, if the outright denial of the request would not be a taking, the government may approve the request with a condition which directly furthers the goal that could have justified complete prohibition of the project. (*Id.* at p. 836.) This nexus test states: "In short, unless the permit

condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " (*Id.* at p. 837.)

In *Nollan,* the court found it "impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." (*Id.* at p. 838.)

In the case at bar, the City cannot pass either of the two parts of *Nollan*. We find no legitimate justification for banning Ehrlich's condominium project. The argument that the project would deprive the City of needed recreational facilities is without merit. Ehrlich had closed his recreational facility and certainly the City could not have forced Ehrlich to reopen the facility to provide the City with much needed recreational facilities. The $280,000 exaction was not to mitigate or reduce a harm caused by Ehrlich's project. It was the City's way to provide a public benefit at the expense of one individual. There certainly is the possibility that the 30 units would create a need for more recreational facilities. However, that is the reason that the City legally imposed the in-lieu parkland fee of $30,000. The in-lieu parkland fee was not objected to by Ehrlich and is certainly a legitimate exercise of authority by the city. The city cannot condition the building permit for the project upon Ehrlich's paying $280,000.

The City cannot pass the second part of the Nollan test. There would not have been a governmental purpose served if the project would have been banned. The City certainly would not have had the continued operation of

Ehrlich's recreational facility since it had been out of business for approximately one year prior to the City approving the project. There appears to be no recognizable legitimate governmental purpose for precluding Ehrlich from developing the property. In fact, there is a strong likelihood that a substantial governmental interest would have been served by allowing the non-used land to provide housing for several families. In addition, it is quite possible that the aesthetics of the City would have been served by the project's addition to the community. The $280,000 exaction certainly exceeds the reasonable cost of providing park and recreational activities for 30 town homes.

The City's reliance on *Gilbert v. State of California* (1990) 218 Cal.App.3d 234 is misplaced. *Gilbert* follows *Nollan* in requiring the permit condition to serve the same governmental purpose as the development ban. In *Gilbert*, it was established that the water moratorium insured a potable water supply. The denial of the operating permit resulted in the same end, a potable water supply. The *Nollan* nexus was present. (*Id.* at pp. 253-254.)

In *Rohn v. City of Visalia, supra*, 214 Cal.App.3d 1463, the City conditioned a zone change and building permit for an office building upon the dedication of 14 percent of Rohn's land to be used to correct the street alignment at the intersection where the property was located. This condition was imposed even though the City had determined that Rohn's proposed office building would generate less traffic impact than if the property were developed as multiple family dwellings as permitted by the then existing zoning. In *Rohn*, the court found that the proposed dedication bore no relationship to the use of

Rohn's property and the City could not impose it as a means of shifting the cost of a public benefit to another party. (*Id.* at pp. 1474-1476.) In *Rohn*, the street realignment was made necessary by an instance of poor planning during the original development of the intersection, and the City viewed the landowner's application for rezoning and site plan review as the "hook" it needed to acquire the property for nothing. It is quite possible that in the case at bar, the City viewed Ehrlich as the "hook" it needed to acquire needed recreational facilities at the expense of one developer.

The record is certainly devoid of evidence showing why a 30-unit condominium project creates an impact on the City requiring $280,000 of public recreational fees above and beyond the $30,000 already required of Ehrlich under the in-lieu parkland fee.[4]

B. Attorneys' Fees Pursuant to Code of Civil Procedure section 1036

The City argues that even if the mitigation fee does not meet constitutional standards as a valid development exaction, the City did not take any interest in Ehrlich's property. We disagree. The trial court decided that a taking had taken place under the test established in *Nollan*. In *Nollan*, the Supreme Court held that where a permit condition fails to substantially advance the original purpose of the building restriction, the condition becomes a plan to extort a public benefit without the

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[4] Since we find that the $280,000 fee is not justified pursuant to *Nollan*, we find it unnecessary to discuss the other arguments advanced by Ehrlich to invalidate the fee.

payment of compensation in violation of the fifth amendment. It was the City's unconstitutional imposition of the $280,000 exaction that constitutes the unlawful taking in this case. Attorney's fees and costs under Code of Civil Procedure section 1036 are mandated.

We conclude that denial of all viable use of the property is not required to an award pursuant to Code of Civil Procedure section 1036. Section 1036 requires only a taking of "any interest in real property." Interpreting the predecessor statute, section 1246.3, the courts have recognized the broad interpretation of the term "taking." In *Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d. 648, 653, the court commented that the Legislature intended to provide recovery for "encroachments upon lesser property interests." Also in *Holtz* the court held that a "taking" as used in the statute is less restrictive than a "taking" under California Constitution article I, section 19.[5]

C. Arts in Public Places Exaction

(1) Government Code Sections 66000 Et Seq.

Ehrlich argues that the art in public places exaction must be vacated because the City failed to comply with

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[5] Article I, section 19 provides as follows: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

the requirements of Government Code sections 66000 et seq. We disagree. Government Code sections 66000-66009 govern fees for development projects. However, we conclude the provisions of section 66000 et seq. do not apply to the City's art in public places program.

The developer's fee statute applies to local government actions which impose a fee as a condition of approval after January 1, 1989. The art in public places program allocation is not a fee as defined in the developer's fee statute. Government Code section 66000, subdivision (b) provides in part: " 'Fee' means a monetary exaction, other than a tax or special assessment, which is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project. . . . " The language is clear that a developer fee involves a monetary exaction. That is not the case in the City's arts in public places exaction. The program allows the developer the option of placing art on the project site, or at the developer's option, paying a fee in lieu of placing the art work on the project. The trial court correctly used the analogy to a landscaping requirement for a project. It would appear reasonable that if a City could impose a requirement of landscaping on a project, the City could also impose a requirement of some sort of art to be placed on the project. Ehrlich elected not to place the art on the project and cannot now complain concerning the monetary exaction the City imposed pursuant to its art in public places ordinance.

The developer's fees statutes expressly excludes the in-lieu parkland fees which may be imposed on a development pursuant to Government Code section 66477. The in-lieu art fee is very similar to an in-lieu parkland fee. Under either an in-lieu parkland fee or an in-lieu art fee, the fees are only paid upon the developer's election. The trial court concluded that Ehrlich elected to pay the fee in lieu of placement of art.

We do not believe that the art in public places program results in a possessory taking of land. The art program did not require any public dedication of land. According to City's ordinance section 33H-31(a) any art work installed by the property owner belongs to the property owner.

(2) Legitimate Exercise of the Police Power of City

There are legitimate public interests in the pursuit of art and artistic creations. In 1976, the Legislature adopted the "Art in Public Buildings Program."[6] In addition, in 1979 and in 1982, the Legislature enacted statutes designed to preserve works of art by the adoption of Civil Code sections 987 and 989. The adoption of the art in public places program by the City in 1988 was certainly

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[6] Government Code section 15813 provides as follows: "The Legislature finds and declares that the State of California has a responsibility for expanding public experience with art. The Legislature recognizes that other states have enacted legislation requiring the expenditure of 1 percent of funds allocated for the construction of state buildings for works of art for such buildings."

the type of program envisioned by the Legislature and was certainly within the legitimate police powers of the City. Even in *Nollan, supra,* 483 U.S. at p. 835, Justice Scalia, reaffirmed that there is a wide range of legitimate government interests.

It is not our duty to look at the wisdom of the City when it enacted the arts in public place ordinance or to determine if the providing of art in an urban environment will enhance the quality of life, health, or welfare. In *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, the court upheld the imposition of school fees pursuant to Government Code sections 53080 and 65995. In *Garrick,* there was a criticism of using permanent construction as opposed to less costly, movable structures. However, the court said the choice between the two was one for the school district and their wisdom was not to be second-guessed. (*Id.* at p. 333.) While we may believe that there may be other ways to fulfill the purpose of the arts in-lieu ordinance, it passes constitutional muster and our inquiry stops there.

Ehrlich's argument concerning the one percent allocation of the ordinance is without merit. This cost is consistent with the Legislature's recognition of the one percent in the Art in Public Buildings Program. (Gov. Code, § 15813.) This certainly appears to be a reasonable figure for the developer if the developer elects not to place art work on the property himself. One percent is certainly substantially less than is frequently required for landscaping.

(3) Special Tax

Ehrlich also argues that the art in public places program is a special tax imposed without a two-thirds vote of the electorate. We disagree. The arts in public places ordinance is not a way for the City to replace revenue lost as a result of Proposition 13. There was no revenue producing function by the City's art in public place program. All developments that are subject to the program have the choice of placing artwork on the property and they will be the owners of the artwork. If all developers were to choose this option, it could hardly be argued that the program would be a special tax and prohibited without the vote of two-thirds of the citizens. We believe that if the City would have wanted the program to be revenue producing, it would not have been designed as a program that provided the in-lieu option.

As the City pointed out correctly in their brief, the City's art in public places allocation is related to the increased needs created by the condominiums and is similar to the rationale underlying the park dedication for subdivisions sustained in *Associated Home Builders Etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633.[7]

D. Attorney's Fees

Ehrlich requested an award of attorney's fees pursuant to Government Code section 800 and Code of Civil

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[7] We also reject Ehrlich's argument that the ordinance violates his free speech. The developer determines the art work to be used, subject to very limited input by the City.

Procedure section 1021.5. The trial court denied Ehrlich's request and found that "[t]hese issues are not so clear as to justify imposition of fees." We do not find an abuse of discretion in the denying of attorney's fees pursuant to these sections.

In *Kreutzer v. County of San Diego* (1984) 153 Cal.App.3d 62, 78, the court held that the determination of whether an action is arbitrary or capricious is essentially one of fact and is within the sound discretion of the trial court. In *Forrest v. Trustees of Cal. State University & Colleges* (1984) 160 Cal.App.3d 357, 368, the court determined that the question of arbitrary or capricious is a question of fact and the decision of the court will be sustained on appeal unless an abuse of discretion is shown.

The decision as to whether attorney's fees are warranted pursuant to Code of Civil Procedure section 1021.5 rests within the sound discretion of the trial court. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142.) There was a proper basis for the trial court to deny attorney's fees to Ehrlich. While Ehrlich was certainly the prevailing party as to the $280,000 mitigation fee, the trial court still did not grant attorney's fees under either section. Under Code of Civil Procedure section 1021.5, the denial was proper because the trial court may not award attorney's fees if there is a significant private benefit, as opposed to a public one. Certainly Ehrlich's purpose in fighting the $280,000 fee was for his own pecuniary interest and the Code of Civil Procedure section was not designed to reward litigants motivated by their own pecuniary interest. (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 113-115.)

E. Reinstatement of the Lien

City filed their notice of appeal and deposit of release of lien pending decision of the Court of Appeal. The City argues that with the filing of that notice of appeal and deposit of release of lien, jurisdiction over those issues determined by the court on December 14, 1990 was removed to the Court of Appeal. We disagree.

The law provides that the trial court may provide that its order granting a writ of mandate is not stayed pending appeal.[8]

The superior court found irreparable damage.[9] The City incorrectly relies on Code of Civil Procedure section

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[8] Code of Civil Procedure section 1110b provides as follows: "If an appeal be taken from an order or judgment granting a writ of mandate the court granting the writ, or the appellate court, may direct that the appeal shall not operate as a stay of execution if it is satisfied upon the showing made by the petitioner that he will suffer irreparable damage in his business or profession if the execution is stayed."

[9] The minute order of the court dated December 12, 1990 stated: "The judgment requires release of the lien imposed to secure the tennis court exaction. That provision of the judgment is appropriate inasmuch as the exaction, and hence the lien, has been ruled invalid after trial. The judgment will be modified, however, to provide that the lien securing the tennis court exaction must be removed no later than 1/7/90 [1/7/91] in order to allow time for the City to seek appellate court action on this point before the lien is removed. If, after removal of the lien, the tennis court exaction is reimposed by the appellate courts, the City can still collect the amount imposed from petitioner; no indication to the contrary appears. The amount of the exaction should not constitute a lien on the condominiums which by that time will likely be owned by third party purchasers. Nor should the City be able to thwart success of the project by frustrating

917.3. Section 917.3 only applies "if the judgment or order appealed from directs the execution of one or more instruments. . . . " The minute order or the partial judgment or the writ did not direct the execution of any particular instrument, just the removal of the lien by January 7, 1991.

The revised partial judgment was not stayed by the notice of appeal filed by the City and the trial court properly ordered release of the lien.

DISPOSITION

The judgment is affirmed. Each party to pay their own costs.

NOT TO BE PUBLISHED

JACKSON, J.*

We concur:

BOREN, Acting P. J.

GRIGNON, J.

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sales by clouding petitioner's title to the project with a lien that has been ruled, after trial, invalid."

(*Assigned by the Chairperson of the Judicial Council.)

APPENDIX H

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 85

DATE September 6, 1990

HONORABLE JOHN ZEBROWSKI JUDGE

HONORABLE JUDGE PRO TEM

2. Deputy Sheriff

S. MCCALL DEPUTY CLERK ___

ELECTRONIC RECORDING MONITOR

NONE

Reporter
(Parties and counsel checked if present)

C 730 079
Richard K. Ehrlich, etc., Counsel for Plaintiff

vs
City of Culver City, et al., Counsel for Defendant

NATURE OF PROCEEDINGS.

PETITION FOR WRIT OF MANDATE

In this matter heretofore submitted on August 14, 1990, the court announces its decision as follows:

I. The Tennis Court ($280,000) Exaction:

1. Petitioner is building a condominium project which will presumably bring additional residents to the area. Petitioner may therefore be assessed with an in-lieu parkland fee – this seems not to be disputed. *See also,*

regarding parkland exactions, *Associated Homebuilders v. City of Walnut Creek*, 4 C3 630 (1971).

2. Important here is that it be clear that in issue here is *not* an in-lieu parkland fee, but rather an additional fee above the in-lieu parkland fee. The stated purpose of this additional fee is to "replace" tennis courts no longer available in the community due to the closing of petitioner's private tennis club.

3. Petitioner's club (although most likely a public accommodation for civil rights purposes) was at all times private property; the city never owned any interest in it nor was any part of it ever dedicated to public use. It is conceded that petitioner had no obligation to maintain his facility available for public use, but rather that petitioner retained the right to exclude the public from his premises. It is true that the public accommodation laws would essentially require petitioner to make the facilities available to the public generally so long as the premises were operated as a business, but there was no requirement that petitioner operate the premises as a business. Instead, petitioner was at all times free to go out of business, which he in fact did.

4. This situation is controlled by *Nollan v. Coastal Commission* and *Rohn v. City of Visalia*. In *Rohn*, a California appellate case following *Nollan*, the court noted:

> " . . . A grant of public privilege, such as a building permit, may not be conditioned upon the deprivation of constitutional protections . . . An arbitrarily conceived exaction will be nullified as a disguised attempt to take private property for public use without resort to eminent domain or as a mask for discriminatory

> taxation . . . If the applicant must donate property for a public use that bears no relationship to the benefit conferred on the applicant or the burden imposed on the public, there is a taking of property . . . "
>
> " . . . Where the conditions imposed are not reasonably related to the landowner's proposed use, but are imposed by the public entity to shift the burden of providing the cost of a public benefit to one not responsible, or only remotely or speculatively benefitting from it, there is an unreasonable exercise of police power."

5. Here, the property owner's action in developing a condominium project will likely create a need for more public recreation facilities in the area, but that is already addressed by the in-lieu parkland fee. There is otherwise no reasonable relation, within the requirements of *Nollan* and *Rohn*, between the petitioner's project and the need for public tennis courts in Culver City.

6. In *Nollan*, the issuance of the permit allowed construction of a house which would impair the public view of the public beach. Conditions designed to maintain the view or to mitigate its obstruction were therefore found permissible. Conditions unrelated to the obstruction of the view, in particular the requirement of the granting of a lateral easement along the beach and unrelated to the view, were not permissible.

7. The exaction of money instead of land is different in kind but not principle. In this case, petitioner's actions cannot legally be said to deprive the City of tennis courts, because neither did petitioner have an affirmative duty to provide tennis courts to the City or its residents nor

would tennis courts necessarily be available to the City but for petitioner's project (petitioner was at all times free to discontinue business as a tennis club, and in fact did so). The City's proposed exaction is – as discussed in *Rohn* – simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer.

8. The City could have condemned a portion of petitioner's property for use as City tennis courts, but the City would then of course have had to pay for the land. Here, instead of taking land for which it would have had to pay, the City proposes to take not land but money. This is equally impermissible.

9. Petition for writ of mandate granted as to the $280,000 tennis court exaction on grounds (b), (c) in the sense that the exaction constitutes an unequal tax discriminatorily applied, and that portion of (e) stating that the exaction constitutes a taking of private property without compensation. Petitioner to prepare order and judgment consistent with this order with return date in approximately 60 days.

II. The "Art in Public Places" Exaction:

1. The City's police powers extend to imposing certain requirements on construction projects. For example, so long as not to the extent of a taking, the City may specify pursuant to its police powers setbacks, amount of open space to be retained, landscaping requirements, etc. Here the City has imposed a requirement of art placement or, in lieu of art placement, a fee for art at a

different location. Petitioner has opted for the fee payment. This seems quite analogous to an in-lieu parkland fee.

2. If the City can require landscaping or the planting of a tree on-site, could the City not allow instead as an option the funding of the planting of a tree or landscaping off-site? It seems that for petitioner to invalidate the in-lieu art fee, petitioner would have to establish that the City has no power to require art on the site. If it can require art on the site, then by analogy to the parkland fee, the City can instead allow payment of a fee for art off the site.

3. The court does not reach the issue of the City's demand for an easement for viewing of art placed on site, since the on-site art option is not the option involved here. It if were, the easement portion of the requirement might be invalidated without invalidating the requirement for placement of art visible from off-site.

4. The court finds the art fee within the scope of the City's police powers and the petition for writ of mandate invalidating the art exaction is therefore denied. Petitioner may set a further hearing, if petitioner so desires, regarding the question of the City's compliance with proper procedure in specifying the use to which petitioner's art fee shall be put and the steps taken to ensure that proper use.

III. Attorney's Fees:

Attorney's fees are denied. These issues are not so clear as to justify imposition of fees.

A copy of this minute order is sent via U. S. Mail this date to counsel for all appearing parties as shown:

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APPENDIX I

2 Civil B 05523

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD K. EHRLICH Respondent/Cross Appellant v. THE CITY OF CULVER CITY, et. al., Appellants/Cross Respondents.	)	B055523 Super. Ct. No. C730079) (Filed June 9, 1993)

Appeal from the Los Angeles
County Superior Court
The Honorable John Zebrowski, Judge

RESPONDENT'S PETITION FOR REHEARING

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Attorney for Respondent
Richard K. Ehrlich

INTRODUCTION

Respondent and Cross-Appellant Richard K. Ehrlich ("Ehrlich") seeks rehearing of the Court's opinion on rehearing filed May 25, 1993 and reinstatement of the Court's opinion filed January 25, 1993. This Petition is brought pursuant to California Rule of Court 29. The bases for this Petition are as follows:

1. Misstatements of fact regarding the imposition of the original land use regulations on the site; and

2. Omissions and misstatements of fact regarding the economic and environmental viability of recreational facilities at the subject site.

Specifically, the Court misunderstands the origin, nature and effect of the Specific Plan which the City imposed on the subject site. As a result, the Court has reached incorrect factual conclusions which are central to the Court's opinion. When the true facts are known, the rationale of the Court's opinion in this case disappears. Ehrlich respectfully submits, that absent these misunderstandings of fact, the Court would not have changed its first ruling in this case affirming the trial court's decision invalidating the $280,000.00 exaction.

DISCUSSION

I.

THE $280,000 WAS NOT TO MITIGATE THE LOSS OF NEEDED RECREATION FACILITIES

The rationale of the Court's opinion rests upon the City's contention that the $280,000 was required to promote the purpose of the Specific Plan, ie. to insure the

existence and/or mitigate the loss of *needed* recreational facilities. The Specific Plan, however, was not adopted by the City to insure that City would be provided with needed recreational facilities, but rather to assuage surrounding neighbors who were vehemently opposed to the use of the site for any type of recreational facility, and to *"mitigate any adverse effects which might otherwise occur" due to the construction of Ehrlich's recreational facility on the site and to insure that no other C-3 uses, including recreational facilities other than Ehrlich's recreational facility would be constructed and/or operated on the site.* C.T. 497, 486, 491, 502, 499-513.

Consequently, the purpose of the Specific Plan is not promoted by the imposition of a "mitigation fee" to offset the loss of *needed* recreational facilities in the City. In truth, all of the arguments validating the $280,000.00 proffered by the City are mere subterfuge to mask the City's true intent to extort from Ehrlich a portion of the estimated $10,000,000 value of the townhome project.

II.

THE SPECIFIC PLAN CONSTITUTES A TAKING

The Court's opinion appears to express an assumption that the Specific Plan permitted Ehrlich to make alterations to his facility which might have permitted the profitable operation of some recreational facility on the site. The Specific Plan, however, prohibits the alteration of the recreational facility in any way. C.T. 497, 486, 491, 502, 499-513.

By its own terms, the Specific Plan does not permit the operation of any recreational facility on the subject site. To the contrary, *development and operation of a recreational facility was limited to the exact facility which Ehrlich and countless others had attempted to operate on the site for 12 years.* C.T. 485-513.

By incorporating the site plan of the existing recreational facility into the Specific Plan, the Specific Plan, in effect, dictates the exact nature, including size, placement, type and location, of each improvement down to the last tree. Changes to Ehrlich's facility were expressly prohibited. Any alteration of the improvements without amendment or removal of the Specific Plan would be unlawful and result in closing of the facility as well as other civil and/or criminal penalties.

In its first ruling, the Court correctly stated that the Specific Plan and the City's refusal to remove its limitations denied Ehrlich of all economically viable use of the subject site and constituted a taking. In support of this conclusion, this Court cited the findings contained in the feasibility study commissioned by the City to wit: *It was extremely doubtful that the facility could operate at on a break-even or profitable basis in accordance with the layout mandated by the Specific Plan. A viable recreational facility would require substantial changes to the building structure and lay-out of the facility, including removal of various tennis courts, destruction of the existing building, and addition of at least 50 parking spaces requiring acquisition of space from neighboring properties, all at a substantial expense.* C.T. 1136-1143, 1147, 1152, 1154-1156, 1166-1167, 1196-1199. The "circumstances" cited in the record which might provide for the profitable operation of a recreational facility on the site

are therefore not available in this case. Consequently, the Specific Plan denies Ehrlich all economically beneficial use of his property.

III.

THE SPECIFIC PLAN LIMITATIONS DID NOT EXIST AT THE TIME EHRLICH PURCHASED THE PROPERTY

In its Petition for Rehearing, the City has knowingly misled this Court by *intentionally* omitting material facts in order to misrepresent evidence contained in the record. The City is well aware that in September 1973, Ehrlich as president of and on behalf of Downtown Development Corporation ("DDC") entered into an agreement to purchase the subject site from Mary Jane Brown aka Mary Jane Malone, Shiela Ann Malone, Anna Marie Rehm and Evelyn K. Carrington. Subsequent thereto, in early 1974, in connection with the development of Ehrlich's recreational facility and on behalf of DDC, Ehrlich submitted a site plan to the City for approval. The City has this application in its files and is well aware that Ehrlich was acting on behalf of DDC. C.T. 485-495. Ehrlich appeared at numerous planning commission and City council meetings to answer questions and concerns of neighboring homeowners who vehemently opposed the use of the site as a recreational facility of any kind. C.T. 496, 499. The purchase of the subject property was finalized in January, 1975, with title being vested in Ehrlich rather than DDC, one month prior to the February 1975 Specific Plan Amendment. C.T. 160, 510-512.

The Specific Plan was not part of the bundle of "investment backed expectations" which Ehrlich and

DDC purchased when it entered into the purchase agreement in 1973. The Specific Plan was adopted in August 1974 by the City Council in lieu of the usual and customary procedure of site plan review. (The site plan review process does not impose by ordinance permanent limitations on the use of property.) The Specific Plan prohibited the use of the site for anything but Ehrlich's recreational facility. C.T. 486.

This is exactly the kind of over-restrictive and abusive zoning of which Justice Scalia warns in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677;

> "One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulations which the state then waives to accomplish other purposes, leading to lesser realization of the land use goals purportedly sought to be served than would result from more lenient (but non-tradeable) development restrictions . . . "

The scheme adopted by the City in this case is exactly identical to that described by Justice Scalia. The Court's opinion permits and encourages a City to over regulate property and then exact extortion monies from developers to buy their way out of the overweening restrictions. This is especially true if the Court permits the City to concoct, ex post facto, justifications for legislation which did not originally exist. If this is allowed, then *Nollan* no longer exists.

IV.

CONCLUSION

For all the foregoing reasons, Ehrlich respectfully requests that a rehearing be granted and that the opinion be modified to affirm the trial court's holding invalidating the $280,000.00 and awarding attorneys, fees pursuant to Section 1036.

Dated: June 8, 1993 By: /s/ Lisa S. Ehrlich
LISA S. EHRLICH
Attorney for Respondent

APPENDIX J

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 5 DATE: 06/23/93

Lisa Ehrlich
901a North Pac. Coast Hwy
Suite 200
Redondo Beach, CA. 90277

RE: Ehrlich, Richard K.
vs.
Culver City, City of
2 Civil B055523
Los Angeles NO. C730079

THE COURT:
Petition for rehearing denied.

APPENDIX K

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD K. EHRLICH, etc.,	B055523
Plaintiff, Respondent and Appellant,	(Super. Ct. No. C730079
vs.	ORDER
THE CITY OF CULVER CITY, et al.,	(Filed Mar. 30, 1993)
Defendant, Appellant and Respondent.	

THE COURT:

The court having granted petition for rehearing on February 22, 1993, IT IS HEREBY ORDERED that the above-entitled matter is resubmitted as of February 22, 1993.

APPENDIX L

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 5 DATE: 02/22/93

Edward J. Horowitz
11661 San Vicente Blvd
Suite 1015
Los Angeles, CA. 90049

RE: Ehrlich, Richard K.
vs.
Culver City, City of
2 Civil B055523
Los Angeles NO. C730079

THE COURT:

APPELLANTS' REHEARING PETITION GRANTED.

APPENDIX M

ORDINANCE NO. 89-026

AN ORDINANCE OF THE CITY OF CULVER CITY, CALIFORNIA, AMENDING SECTION 37-4 OF THE CULVER CITY MUNICIPAL CODE BY RECLASSIFYING PROPERTY LOCATED AT 4901 OVERLAND AVENUE FROM THE CURRENT COMMERCIAL (C-3) ZONE WITH SPECIFIC PLAN SP-1-74, AS AMENDED, TO A LOW DENSITY MULTIPLE FAMILY DWELLING (R-3A) ZONE; AND ADOPTING SPECIFIC PLAN, SP NO. 88-02, FOR DEVELOPMENT OF A 30-UNIT TOWNHOUSE CONDOMINIUM COMPLEX SUBJECT TO CERTAIN CONDITIONS.

WHEREAS, the Planning Commission, after due notice as required by law, held a public hearing on the applications of Richard K. Ehrlich to rezone the subject property under Zone Change, ZC No. 88-04, and Specific Plan, SP No. 88-02, in conjunction with an application for a General Plan Amendment, GPA No. 88-02, and Tentative Tract Map No. 47016, TTM No. 88-04, and related application for Design and Physical Development Plan Amendment, DPDPA No. 88-02;

WHEREAS, the Planning Commission, after due notice as required by law, held hearings on the application of Richard K. Ehrlich for General Plan Amendment, GPA No. 88-02, in conjunction with a request for a change of zone, Zone Change, ZC No. 88-04, Specific Plan, SP No. 88-02, and Tentative Tract Map No. 47016, TTM No. 88-04, and related application for Design and Physical Development Plan Amendment, DPDPA No. 88-02;

WHEREAS, the property is identified as a two and four-tenth acre (2.4±) site located at 4901 Overland Avenue, being a certain portion of the Rancho La Ballona

tract, and is currently designated with a Commercial designation in the Land Use Element of the General Plan;

WHEREAS, the Planning Commission held duly noticed public hearings on the applications on January 11, 1989 and March 8, 1989, and, at the conclusion thereof adopted Resolution No. 89-P004, approving and recommending City Council approval of the application to rezone the above-referenced property to a low density multiple family (R-3a) Zone, and adopted Resolution No. 89-P011, approving and recommending to the City Council approval of Specific Plan, SP No. 88-02 subject to certain conditions;

WHEREAS, after due notice as required by law, hearings were held by the City Council on April 10, 1989 and August 14, 1989, and all interested persons were given an opportunity to be heard;

WHEREAS, it appears to the City Council that the change of zone and adoption of Specific Plan, as recommended by the Planning Commission, is in the public interest and should be approved; and

WHEREAS, pursuant to the foregoing recitations, the following findings are made:

(a) All necessary preliminary proceedings have been held covering the proposed zoning of an adoption of Specific Plan for the property hereinafter described; that due notice has been given to the property owners, and that opportunity has been afforded to all interested persons to be heard both for and against the proposed zoning and Specific Plan, in hearings before the Planning Commission and the City Council.

(b) The proposed zoning of and adoption of the Specific Plan for the property hereinafter described is in the public interest; the change of zone will, in conjunction with the Specific Plan and all its conditions, control the specific kind and intensity of residential development permitted on this site; and the public necessity, convenience, general welfare and good zoning practice justifies the change of zone and adoption of Specific Plan.

(c) The proposed reclassification will not be detrimental to the public welfare nor to the property of other persons located in the vicinity thereof; the change of zone and the Specific Plan with all its conditions will not adversely affect the comprehensive general plan, as approved in the related General Plan Amendment GPA No. 88-02; the change of zone and The Specific Plan with all its conditions are consistent with the residential neighborhood now existing on the northwest and the southeast side of the site.

(d) The change of zone and adoption of the approved Specific Plan with all its conditions will control the specific kind and intensity of residential uses permitted on this property; it provides additional housing in a job rich area; it provides an aesthetic reuse of property which has had a history of misuse detrimental to the immediately surrounding neighborhood; and it provides for mitigation of the loss of needed community recreational facilities.

(e) In compliance with the requirements of the California Environmental Quality Act of 1970, as subsequently amended, and based upon staff's "Inital Study" of the environmental impacts of this project, the City Council, acting

as the "lead agency" hereby determines the proposal could not have a significant impact on the environment, and therefore, adopts a negative declaration and directs a Notice of Determination be prepared and filed with the Los Angeles County Clerk.

NOW THEREFORE, The City Council of the City of Culver City, California, DOES HEREBY ORDAIN as follows:

SECTION 1. The property consisting of that portion of the Rancho La Ballona, in the City of Culver City, in the Country [sic] of Los Angeles, State of California, described as set forth in Exhibits A and B attached hereto and incorporated by reference herein, located at 4901 Overland Avenue, is hereby rezoned from Commercial (C-3) to a Low Density Multiple Family Dwelling (R-3a) Zone. The Zoning Map of the City of Culver City, included in Section 37-4 of the Culver City Municipal Code, is hereby amended to show such reclassification and rezoning, and the portion of the map as amended is hereby made a part of the map.

SECTION 2. Specific Plan, SP No. 88-02, is hereby approved as recommended by the Culver City Planning Commission, as set forth in Resolution No. 89-P011, and further subject to the following condition:

(1) Unless the developer has obtained a building permit for and commences construction of the 30-unit townhouse condominium complex per the plans file dated March 1, 1989, within the one year period following November 1, 1989, or such extensions as may be granted by the City Council in its sole and absolute discretion, the developer shall not be permitted to

commence construction of the 30-unit townhouse condominium units until a site plan review approval is obtained and shall not be permitted to change the project without obtaining a modification of the Specific Plan, SP No. 8-04.

(2) Condition No. V is added as follows: "V. Prior to issuance of any temporary or final Certificate of Occupancy for the proposed project, the developer shall pay to the City the amount of $280,000.00 to be used for additional recreational facilities as directed by the City Council."

SECTION 3. This Ordinance shall take effect thirty-one (31) days from the date of its adoption and prior to the expiration of fifteen (15) days from the adoption hereof the City Clerk shall cause this Ordinance to be published in the Culver City News.

APPROVED and ADOPTED this 11th day of September, 1989.

/s/ Richard Alexander
RICHARD ALEXANDER,
VICE MAYOR
City of Culver City,
California

ATTEST:

/s/ Pauline C. Dolce
PAULINE C. DOLCE,
City Clerk

APPROVED AS TO FORM:

/s/ Joseph W. Pannone
JOSEPH W. PANNONE
City Attorney

APPENDIX N

ORDINANCE NO. 88-019

AN ORDINANCE OF THE CITY OF CULVER CITY, CALIFORNIA, ADDING ARTICLE II TO CHAPTER 33H (COMMENCING WITH SECTION 33H-20) TO ESTABLISH AN ART IN PUBLIC PLACES PROGRAM, AND RESERVING SECTIONS 33H-12 THROUGH 33H-19, INCLUSIVE, FOR FUTURE USE.

The City Council of the City of Culver City, California, DOES HEREBY ORDAIN as follows:

SECTION 1. Sections 33H-12 through 33H-19, inclusive, of the Culver City Municipal Code are hereby reserved for future use.

SECTION 2. Article II is hereby added to Chapter 33H to read:

ARTICLE II

ART IN PUBLIC PLACES

Section 33H-20. Purpose.

The City Council finds and declares:

(a) Cultural and artistic resources enhance the quality of life for individuals living in, working in and visiting the City.

(b) Balanced development of cultural and artistic resources preserves and improves the quality of the urban environment and increases real property values.

(c) As development and revitalization of the real property within the City continues, the opportunity for creation of cultural and artistic resources is diminished.

(d) As this development and revitalization continues as a result of market forces, urbanization of the community results.

(e) As these opportunities are diminished and this urbanization occurs, the need to develop alternative sources for cultural and artistic outlets to improve the environment, image and character of the community is increased.

(f) Development of cultural and artistic assets should be financed by those whose development and revitalization diminishes the availability of the community's resources for those opportunities and contributes to community urbanization.

(g) Establishment of this Art in Public Places Program will promote the general welfare through balancing the community's physical growth and revitalization and its cultural and artistic resources.

Section 33H-21. Culver City Arts Committee Established.

There shall be a Culver City Arts Committee to fulfill the duties established in this Article. The City Council may prescribe, by resolution, other duties, and the qualifications of and appointment process for the members of the Committee.

Section 33H-22. Fund Created.

(a) There is hereby created a fund to be known as the "City Art Fund" to account for fees paid pursuant to this Article. This fund shall be maintained by the City Treasurer, and

shall be used solely for the acquisition, installation, improvement, maintenance and insurance of art work to be displayed in the City.

(b) For a period of five years from the effective date of this Article, only expenditures for physical art as defined in Section 33H-30(a) shall be permitted.

Section 33H-23. Applicability.

(a) All new residential development of more than four units, and all commercial, industrial, and public building development projects, with a building valuation exceeding $500,000.00 shall be subject to the provisions of this Article, provided that the value of a residential unit covenanted for low- or moderate-income households, or for senior citizens shall not be included when determining the value of a residential development.

(b) Including but not limited to exterior and interior modifications and additions, all remodelling [sic] of existing residential buildings of more than four units, and all remodelling [sic] of existing commercial, industrial and public buildings, shall be subject to the provisions of this Article when such remodelling [sic] has a valuation exceeding $250,000.00, excluding earthquake rehabilitation required by this Code for seismic safety. As used herein, the value of a residential unit covenanted for low- or moderate-income households or for senior citizens shall not be included when determining the value of a residential development.

Section 33H-24. Certificates of Occupancy.

(a) No final City approval, such as final inspection or a Certificate of Occupancy, for any project subject to this Article shall be granted or issued unless and until full compliance with the Art in Public Places Program is achieved, in one or more of the following ways:

(1) The approved art work has been placed in a matter satisfactory to the Community Development Director.

(2) In lieu art fees have been paid.

(3) Financial security in an amount equal to the acquisition and installation costs of an approved art work, in a form approved by the City Attorney, has been posted.

(4) Donation of an approved art work has been accepted by the City Council.

(b) For the purposes of this subsection (a), "full compliance with the Art in Public Places Program" shall not be found until the entire program allocation required by Section 33H-25 for the project has been satisfied.

(c) If any approved art work placed on private property pursuant to this Article is removed without City approval, the Certificate of Occupancy may be revoked.

Section 33H-25. Program Allocations.

(a) The program allocation, as used in this Article, is the percentage of the building cost which is set aside for the City's Art in Public Places Program and shall be an amount equal to

one percent (1%) of the total building valuation for an applicable project, excluding land acquisition and off-site improvement costs. The total building valuation shall be computed using the latest Building Valuation Data as set forth by the International Conference of Building Officials (ICBO) unless, in the opinion of the Building Official, a different valuation measure should be used.

(b) In lieu of placement of an approved art work, the applicant may pay to the City Art Fund an amount equal to the program allocation set forth in subdivision (a).

(c) Nothing in this section shall prohibit the applicant from placing an approved art work with acquisition and installation costs in an amount less than the program allocations; provided that the applicant shall also pay to the City Art Fund an amount equal to the difference between the program allocation and the costs of acquisition and installation of such art work.

Section 33H-26. Application Procedures for Placement of Art Work on Private Property.

An application for placement of art work on private property shall be submitted to the Planning Division and shall include:

(a) Preliminary sketches, photographs or other documentation of sufficient descriptive clarity to indicate the nature of the proposed art work;

(b) An appraisal or other evidence of the value of the proposed art work, including acquisition and installation costs;

(c) Preliminary plans containing such detailed information as may be required by the City Planner to adequately evaluate the location of the art work in relation to the proposed development, and its compatibility with the proposed development, including compatibility with the character of adjacent conforming developed parcels and existing neighborhood if necessary to evaluate the proposal; and

(d) A narrative statement to be submitted to the Culver City Arts Committee to demonstrate that the art work will be displayed in an area open and freely available to the general public at least ten hours each day, or otherwise provide public accessibility in an equivalent manner based on the characteristics of the art work or its placement on the site.

Section 33H-27. Approval for Placement of Art Work on Private Property.

(a) Except as provided in subsection (b), completed applications shall be submitted to the Culver City Arts Committee for review and approval of the art work, considering the aesthetic quality and harmony of the art work with the existing on-site improvements, and the proposed location of and public accessibility to the art work.

(b) If a development project is otherwise subject to Planning Commission review and approval and includes on-site placement of art work, the Culver City Arts Committee shall review the completed application and make a recommendation to the Planning Commission concerning the proposed art work and its proposed location, considering the aesthetic quality and harmony with the proposed project, and the

public accessibility to the art work, including any recommended conditions of approval. The following shall apply to the review and approval of such development project and art work:

(1) The Planning Commission shall consider the recommendations of the Culver City Arts Committee in its review and approval of the proposed project.

(2) If the applicant proposes or the Planning Commission recommends significant revisions to the architecture or physical design and layout of the proposed project subsequent to receipt of the Culver City Arts Committee recommendation, the revised application shall be returned to the Committee for further review and recommendation concerning the revised proposal prior to resubmittal to the Planning Commission for final review and approval.

(c) Any person may seek review of a Culver City Arts Committee decision made pursuant to subsection (a) by filing an appeal in accordance with Article XXA of Chapter 37 of this Code, commencing with Section 37-120A; provided that, for purposes of this section the reference herein to Planning Commission and Commissioners shall be deemed to mean Arts Committee and Committee members, respectively.

Section 33H-28. Application Procedure for Acceptance of Art Work Donated to the City.

An application for acceptance of art work to be donated to the City shall include:

(a) Preliminary sketches, photographs, models or other documentation of sufficient descriptive clarity to indicate the nature of the proposed art work;

(b) An appraisal or other evidence of the value of the proposed art work, including acquisition and installation costs;

(c) A written agreement executed by or on behalf of the artist who created the art work which expressly waives his or her rights under the California Art Preservation Act or other applicable law; and

(d) Other information as may be required by the Culver City Arts Committee to adequately evaluate the proposed donation of art work.

Section 33H-29. Review of Application for Acceptance of Art Work Donated to the City.

(a) Completed applications shall be submitted to the Culver City Arts Committee for review and recommendation to the City Council.

(b) Recommendations shall be forwarded to the City Council, which shall have the sole authority to accept or reject or conditionally accept the donation.

Section 33H-30. Acceptable Art Work to be Limited.

(a) For a period of five years from September 29, 1988, only applications for approval or donation of art work in the following shall be processed: sculpture; murals or portable paintings; earthworks; fiberworks; neon; glass

mosaics; photographs; prints; calligraphy; and other forms of physical hard media.

(b) At the end of the first five years of the Art in Public Places Program, the Culver City Arts Committee shall review the limitations set forth in subsection (a) and shall recommend any proposed revisions to the City Council.

Section 33H-31. Ownership of Art Work.

(a) All art work placed on the site of an applicant's project shall remain the property of the applicant; the obligation to provide all maintenance necessary to preserve the art work in good condition shall remain with the owner of the site.

(b) Maintenance of art work, as used in this Article, shall include without limitation, preservation of the art work in good condition to the satisfaction of the City, protection of the art work against physical defacement, mutilation or alteration, and securing and maintaining fire and extended coverage insurance and vandalism coverage in an amount to be determined by the City Attorney. Prior to placement of an approved art work, applicant and owner of the site shall execute and record a covenant in a form approved by the City for maintenance of the art work. Failure to maintain the art work as provided herein is hereby declared to be a public nuisance.

(c) In addition to all other remedies provided by law, in the event the owner fails to maintain the art work, upon reasonable notice, the City may perform all necessary repairs, maintenance or secure insurance, and the costs

therefor shall become a lien against the real property.

(d) All art work donated to the City shall become the property of the City upon acceptance by the City Council.

Section 33H-32. Art Work on Public Property.

(a) The Culver City Arts Committee shall prepare an annual plan for the Arts in Public Places Program.

(b) The Culver City Arts Committee may recommend to the City Council the purchase of art work to be displayed on public property. A recommendation shall include the type of art work considered, an analysis of the constraints applicable to placement of the art work on a site, the need for and practicality of the maintenance of the art work, and the costs of acquisition and installation of the art work.

Section 33H-33. Return of Fees.

(a) Fees paid into the City Art Fund which are not committed within five (5) years from the date of payment may be returned to the then current owner of the development project, with all interest actually earned thereon, if a written request for return is filed with the City Clerk during the fifth year after payment, and refund of the fees is approved by the City Council. The request for return shall be verified, and include the date of payment, the amount paid and method of payment, the location of the new development for which the fee was paid, and a statement that the applicant is the payor of the fees or the current owner of the development project.

(b) The City Council shall determine if return of the then uncommitted portion of the fees and interest is appropriate and, if so, the method of refund. No refund shall be appropriate if the City Council determines any one of the following applies:

(1) The City Council finds the fee is needed for the Art in Public Places Program.

(2) Moneys were not posted as fees, but were satisfied by letter of credit, bond or other instrument taken to secure payment at a future date.

(3) The administrative costs of refunding uncommitted fees pursuant to this Article exceeds the amount to be refunded; provided notice of a public hearing on this issue has been published and posted on the site of the development project in not less than three places.

SECTION 3. This Ordinance shall take effect thirty (30) days from the date of its adoption and prior to the expiration of fifteen (15) days from the adoption hereof the City Clerk shall cause this Ordinance to be published in the Culver City News.

APPROVED and ADOPTED this 29th day of August, 1988.

/s/ Paul A. Jacobs,
PAUL A. JACOBS, MAYOR
City of Culver City, California

ATTEST:

/s/ Pauline C. Dolce
PAULINE C. DOLCE,
City Clerk

APPROVED AS TO FORM:

/s/ Joseph W. Pannone
JOSEPH W. PANNONE
City Attorney

ORD/ART/PUBLIC/PLACES

Published in the Culver City News on September 3rd and 8th, 1988.

Supreme Court, U.S.
F I L E D
SEP 5 1996
CLERK

(2)

No. 96-238

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIRDES AND, AND PAUL A. JACOBS,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER RICHARD K. EHRLICH, AS TRUSTEE OF THE 1985 EHRLICH FAMILY TRUST AND AS TRUSTEE OF THE JULY 28, 1965 TRUST, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, AND THE BUILDING INDUSTRY ASSOCIATION OF NORTHERN CALIFORNIA

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The Building Industry Legal Defense Foundation has received the written consent of the parties to file this brief in support of petitioner, and has filed the letters of consent with the Clerk of this Court.

INTERESTS OF AMICI CURIAE

The Building Industry Legal Defense ("BILD") Foundation is a not-for-profit corporation organized under the laws of the State of California. The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California whose 1400 members include a significant number of residential developers and associate businesses that take part in building 70% of all new homes annually in the Southern California region.[1]

The California Building Industry Association ("CBIA") is a not-for profit corporation organized under the laws of the State of California. CBIA represents over 5,000 members who employ over 100,000 people. CBIA's members are involved in all aspects of the building and construction industry.

The Home Builders Association of Northern California ("HBANC") is comprised of more than 800 members who are involved in every aspect of residential, commercial and industrial building in the greater San Francisco Bay Area. HBANC members are responsible for building more than 80% of all new homes in the Bay Area.

The Building Industry Amici's interests lie in countering local governments' funding needs with the needs of the new home buyer for affordable shelter. Some communities in California are now demanding fees up to $77,000 per

[1] The BILD Foundation's mission is to "[d]efend the legal rights of home and property owners." The BILD Foundation promotes and supports important legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally.

house.[2] Heightened scrutiny applied to such fees would demonstrate to an apprehensive home buyer that the fee paid directly mitigated the impact from the new home. Additionally, a 10-20% miscalculation could result in significant savings. According to the National Association of Home Builders, even a $1,000 increase in the purchase price of a home can force 21,000 potential buyers out of the market. *The Truth About Regulations and the Cost of Housing* (NAHB, 1995) p.6.

SUMMARY OF ARGUMENT

Certiorari should be granted to clarify the well-established conflict in various state and federal courts regarding whether the standard articulated in *Dolan v. City of Tigard*, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (hereinafter "*Dolan*") applies to legislatively enacted monetary exactions and whether public agencies possess a compensable property interest in maintaining the perpetuation of land-use designations.

It is evident that monetary exactions or fees should be held to the same level of scrutiny as those involving dedications. For if monetary exactions receive less scrutiny, public agencies will simply impose a fee and then use the fee to purchase a possessory interest or construct a public improvement for which they would have otherwise been required to

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[2] For example, fees associated with the issuance of a building permit in the City of Solana Beach for a 2,000 square foot, 3 bedroom, 2 bath home valued at $169,000 can cost $77,721 [the following fee schedule is legislatively imposed and generally applicable: plan check — $797; building permit — $1,226; MPE permits — $216; seismic — $17; sewer — $4,500; water — $4,761; public facilities — $1,690; parks — $600; fire —$442; elementary school — $8,432 (this amount can run as high as $38,882 for "affordable housing"); high school —$10,590; inclusionary housing —$14,000] excluding fees for engineering, subdivision processing, annual sewer service charges, and *ad hoc* fees.

pay. The law does not permit public agencies to do indirectly what it does not permit them to do directly.

Additionally, there remains a heightened risk of extortion for legislative acts imposing a fee because no notice is required to be given to the fee payor of the requirement. Furthermore, legislative acts do not enjoy absolute deference. The Constitution applies equally to legislative as well as adjudicative acts.

Finally, the Fifth Amendment does not state "nor shall *public* property be taken for a *private* use without just compensation." By creating a public interest in private property, the California Supreme Court has turned the Fifth Amendment on its head.

ARGUMENT

A. CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT ISSUES AS TO WHICH THERE IS A WELL-ESTABLISHED CONFLICT IN BOTH STATE AND FEDERAL COURTS

1. State And Federal Courts Are Split As To Whether *Dolan* Applies To Monetary Exactions In Addition To Those Involving Dedications.

There is a well-developed split on whether Dolan extends heightened scrutiny solely to permit conditions that require the dedication of real property and the concomitant loss of the right to exclude, or whether *Dolan* applies to monetary exactions as well.

Courts that have applied, or suggested the appropriateness of applying, a heightened scrutiny to development fees include state cases such as *Ehrlich v. City of Culver City*, 911 P.2d 429 (1996) (hereinafter "*Ehrlich*"); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347 (Ariz. 1995);

Trimen Development Company v. King County, 877 P.2d 187 (Wash. 1994); *College Station v. Turtle Rock*, 680 S.W.2d 802 (Tex. 1984); *Collis v. Bloomington*, 246 N.W.2d 19 (1976); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966), and *Remmenga v. California Coastal Comm'n*, 163 Cal.App.3d 623, 628 (1985). At least two federal cases have suggested that *Dolan* is relevant in assessing impact fees. *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995) (relying in part on *Dolan* to strike down an affordable housing impact fee); *National Association of Home Builders v. Chesterfield County*, 907 F.Supp. 166, 168 (E.D. Va. 1995) *aff'd*, at 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996).

On the other side, some state courts have limited *Dolan*'s applicability to dedications, or suggested as much. *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995); *Blue Jeans Equities West v. City and County of San Francisco*, 221 Cal.App.3d 1072 (1992). So too have some federal courts. *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995); *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991); *Garneau v. City of Seattle*, 897 F.Supp. 1318 (W.D. Wash. 1995).

2. State And Federal Courts Are Split As To Whether Dolan Applies To Legislative Actions.

A number of state courts have seized on Justice Rehnquist's notation[3] that the exaction in *Dolan* was imposed on a building permit — issuance of which is an "adjudicative" act — to find that heightened scrutiny does not apply to exactions imposed on building permits pursuant to ordinances of general application. *See Ehrlich, supra*; *Loyola Marymount Univ. v. Los Angeles Unified School District*, 45 Cal.App.4th 1256 (1996); *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347 (Ariz. 1995);

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[3] *Dolan, supra*, 114 S.Ct. at 2316, fn. 8.

Southeast Cass Water Resource District v. Burlington Northern Railroad Co., 527 N.W.2d 884 (N.D. 1995); *Waters Landing Limited Partnership v. Montgomery County*, 650 A.2d 712 (Md. 1995); *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994); *Arcadia Development Corp. v. City of Bloomington*, 1996 Minn. App. LEXIS 930 (August 13, 1996). So too has at least one federal court. *Harris v. City of Wichita*, 862 F.Supp. 287 (D. Kan.1994).

Other state courts have held that exactions imposed pursuant to ordinances of general applicability are subject to *Dolan*'s heightened scrutiny. *Art Piculell Group v. Clackamas County*, 1996 Ore.App. LEXIS 1107 (July 31, 1996); *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360 (Or. 1994); *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. 1994); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *Trimen Development Company v. King County*, 877 P.2d 187 (Wash. 1994) [A county ordinance requiring developers seeking to build housing either dedicate land for public parks or pay a fee must meet *Dolan*'s "rough proportionality" test]. So too has at least one federal court. *National Association of Home Builders v. Chesterfield County*, 907 F.Supp. 166, 168 (E.D. Va. 1995) ("[I]n order for *any specific exaction implemented under a zoning ordinance* to pass constitutional muster . . " it must meet *Dolan*'s rough proportionality standard.) *aff'd*, at 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996). *Manocherian v. Lennox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied* 115 S.Ct. 1961, 115 S.Ct. 1962 (1995).

Two members of this Court are on record as supporting granting certiorari to address this issue. In dissenting from the denial of a writ of certiorari the Justices stated:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be

> relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distraction without a constitutional difference.

Parking Association of Georgia, Inc. v. City of Atlanta, Georgia 115 S. Ct. 2268 (1995)(Thomas, J. and O'Connor, J. dissenting).

3. State And Federal Courts Are Split As To Whether Local Government Should Be Compensated When Private Property Is Rezoned.

Ehrlich decided that a municipality may be entitled to some amount of compensation for the loss of certain zoning designations on private property. (*Ehrlich, supra*, 911 P.2d at 446.) Largely in accord are *Garneau v. City of Seattle*, 897 F.Supp. 1318 (W.D. Wash. 1995) (exaction imposed on condominium conversion to compensate city and displaced low-income residents); *Bullock v. City and County of San Francisco*, 221 Cal.App.3d 1072 (1990) (same); *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal.App.3d 892 (1986) (same).

Other courts have disagreed. *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995); *Golden Gate Hotel Association v. City and County of San Francisco*, 864 F. Supp. 917, (N.D. Cal. 1993) *rev'd on other grounds* in 76 F.3d 386.

B. DOLAN APPLIES TO MONETARY EXACTIONS

The Supreme Court's decision in *Dolan* itself strongly suggests that the rough proportionality standard is applicable to monetary exactions. Several of the cases relied upon by this Court in arriving at the rough proportionality standard in *Dolan* involved takings challenges to fees.[4] *E.g., Jordan v.*

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[4] Justice Stevens recognized this point in his dissent, noting that the cases cited by the majority "involve challenges to provisions . . . requiring developers to dedicate either a percentage of the entire

(footnote continues)

Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965); *Collis v. Bloomington*, 246 N.W.2d 19 (Minn. 1976); *College Station v. Turtle Rock*, 680 S.W. 2d 802, (1984); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966).

In addition, courts, like legislatures, do not engage in idle acts. This Court's decision to vacate and remand the Court of Appeal's original decision in *Ehrlich* was a clear signal that the principles set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan* apply to monetary exactions.[5] As the Arizona Court of Appeals stated in *Home Builders Association of Central Arizona v. City of Scottsdale*, 902 P.2d 1347, 1352 (1995), "we agree that the *Ehrlich* remand implies that a monetary fee is subject both to a takings analysis, and . . . to a *Dolan* analysis."

Common sense supports this position. As an initial matter, it is difficult to conceive of a justification for subjecting impact fees to a lesser degree of scrutiny than dedication requirements. Monetary exactions are the functional equivalent of dedications. Treating fees and dedications differently would create a giant loophole in the *Nollan/Dolan* doctrine. If fees were subject to a lesser degree of scrutiny, government would have the incentive and ability to demand mitigation through fees exclusively. Nothing would prevent government from exacting a fee, exercising its power of eminent domain, and using the fee revenue to pay for the acquisition or improvement. From the property owner's perspective, he or she is left in the same position as would have been the case had the original exaction been a dedication requirement.

(footnote continued)

parcel . . . or an equivalent value in cash . . . to help finance the construction of roads, utilities, schools, parks, and playgrounds." *Dolan* at 129 L.Ed.2d 326 (Stevens, J., dissenting).

[5] "Whenever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision in the light of an intervening decision of this Court, the Court is acting on the merits." *Board Of Trustees Of Keene State College et al. v. Sweeney* 439 U.S. 24, 25-26 (1978).

Post-*Dolan* cases recognize this proposition and are in accord with it. In *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), the U.S. Court of Appeals for the First Circuit suggested that *Dolan*'s rough proportionality standard applies to impact fees that were imposed on a development project by the City of Portsmouth, New Hampshire. In *Trimen Development Company v. King County*, 877 P.2d 187, 192 (1994), the Washington Supreme Court applied Dolan's heightened scrutiny to a park impact fee, holding that to be valid, an impact fee must be "required to mitigate the direct impact of the development." And in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (1995), the Illinois Supreme Court subjected a transportation impact fee to *Dolan*'s heightened scrutiny.

Pre-*Dolan* California cases have also suggested that dedications and fees should be evaluated similarly for takings purposes. In *Remmenga v. California Coastal Comm'n.*, 163 Cal.App.3d 623, 628 (1985), the Court of Appeal recognized the functional equivalence of fees and dedications:

> Viewing the problem as a whole, it appears that the requirement to pay an in lieu fee of $5,000 for development of one lot presents essentially the same constitutional issue as would be presented by a requirement that the owner of unimproved property adjoining tidelands dedicate public right-of-way in order to obtain a development permit.

See also, Associated Homebuilders of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (1971) (applying the same takings analysis to a park land dedication requirement and a park impact fee); *Grupe v. California Coastal Comm'n.*, 166 Cal.App.3d 148, 163 (1985) (discussing the proper standard for testing the validity of "all exactions").

In light of the foregoing discussion, Amici submit that *Blue Jeans Equities West v. City and County of San Francisco*, 221 Cal.App 3d 1072 (1992), and *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), were overruled by *Dolan*, contrary to the statement in *Ehrlich, supra*, 911 P.2d at 443. *Blue Jeans Equities*, in particular, relied on reasoning that was expressly rejected in *Dolan*. The Court of Appeal in *Blue Jeans* stated that the "High Court appears to make a distinction between regulatory takings, i.e., economic regulation, and possessory takings." *Blue Jeans Equities* at 169. However, while this position was advanced by Justice Stevens in *Dolan* ("The exactions associated with the development . . . are likewise a species of business regulation that heretofore warranted a strong presumption of constitutional validity." *Dolan, supra*, 129 L.Ed.2d at 327), it was dismissed by the majority.

C. DOLAN APPLIES TO LEGISLATIVE ACTIONS

1. The Limitations Of The Fifth Amendment Apply To Fees Adopted By A Legislative Action As Well As An Adjudicative Action.

The conditions in *Dolan*, like the City's public art fee, were imposed under the authority of an ordinance of general application. The City of Tigard's Comprehensive Development Code required all property owners in the Central Business District to comply with certain dedication requirements for pedestrian/bicycle pathways and greenway/drainage space. *Dolan, supra*, 129 L. Ed. 2d at 311-313. As Justice Souter recognized:

> The majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions . . . , but the permit conditions were imposed pursuant to Tigard's Community Development Plan. *Dolan supra*, 129 L. Ed. 2d at 334 (Souter, J., dissenting).

Thus, the nature of the exaction involved in *Dolan* and in this case are identical on this point: each was imposed on a specific project pursuant to an essentially legislative determination applicable to all development projects.

Nollan, supra, 483 U.S. at 829 makes clear that the exaction imposed was made pursuant to a legislative act, the California Coastal Act of 1976:

> The Superior Court . . . finding, in part to avoid issues of constitutionality, "that the California Coastal Act of 1976, Cal. Pub. Res. Code Ann. @ 30000 et seq. (West 1986), authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea.

Unfortunately, lower courts and public agencies have misread the *Dolan* and the *Nollan* decision by seizing upon the "adjudicative decision" language used by the majority in *Dolan, supra*, 114 S.Ct. at 2316, fn. 8, as limiting the application of *Dolan* and *Nollan*.

Subsequent to its decision in Dolan, the Supreme Court has confirmed that *Dolan* applies to legislative acts. In *Altimus v. Oregon*, 115 S. Ct. 44, (1994), this Court vacated and remanded the case to the Court of Appeals of Oregon "for further consideration in light of *Dolan v. City of Tigard*." *Altimus* involved a takings challenge to an exaction imposed as a condition to a project requesting a zoning change—a legislative act. (See footnote 5, *supra*.)

Post-*Dolan* cases have recognized that heightened scrutiny is appropriate where an exaction is being applied to a particular project, notwithstanding whether the government approval being sought is nominally "legislative" or "adjudicative." In *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d

360 (Or. 1994), the Court applied Dolan's rough proportionality standard to exactions imposed pursuant to a county-wide zoning ordinance:

> [T]he county relies on the fact that some of the improvements are required by its zoning ordinance. As we said in *Schultz v. Grants Pass* . . . however, "the character of the [condition] remains the type that is subject to the analysis in *Dolan*' . . . , whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters. Our conclusion is not at odds with the Supreme Court's differentiation between adjudicative conditions and particular properties and generally-applicable legislative regulations. . . . A condition on the development of particular property is not converted into something other than that by reason of legislation that requires it to be imposed. *Id.* at 365, n.1 (citation omitted).

See also, Schultz v. City of Grants Pass, 884 P.2d 569 (Or. 1994) (*Dolan*'s heightened scrutiny standard applicable to city's exaction, notwithstanding the fact that the exaction was imposed pursuant to city-wide ordinance of general application).

At least one Pre-*Dolan* California decision is in accord. See *Scrutton v. County of Sacramento*, 275 Cal.App. 412 (1969) (applying *Dolan*-like scrutiny to exaction imposed on a rezone application).

2. Concern For A Heightened Risk Of Extortion Requires Dolan's Application to Legislatively Adopted Fees.

The California Supreme Court attempted to distinguish legislative actions of public agencies which adopt generally

applicable fees affecting a broad class of property owners from adjudicative fees:

> Fees of this nature may indeed be subject to a lesser standard [the fee must substantially advance a legitimate state purpose — *Agins v. City of Tiburon* 447 U.S. 255, 260 (1981)] of judicial scrutiny than that formulated by the court in *Nollan* and *Dolan* because the heightened risk of the "extortionate" use of the police power to exact unconstitutional conditions is not present.

(*Ehrlich, supra*, 911 P.2d 429, 444).

The basis for this distinction was this Court's concern, iterated in *Nollan*, that a local agency's exaction may amount to out-and-out . . . extortion. *Ehrlich, supra*, 911 P.2d at 459 citing *Nollan, supra*, 483 U.S. at p. 837. A concern for preventing extortion was the principle for this distinction. The California Supreme Court did not believe that there was a heightened risk of extortion for legislatively adopted fees due to the fact that the legislative process permits the interests of all people to be considered. A legislative action is a "case[] in which the courts have deferred to legislative and political processes to formulate "public program[s] adjusting the benefits and burdens of economic life to promote the common good.' "[6]

If one were to apply the Court's principle regarding extortion, legislative actions should not be treated differently. The heightened risk of extortion, exists no less for legislatively adopted fees. The new home buyer has the least political clout to remedy extortionate fees because he or she usually resides outside of the public agency's jurisdiction at the time of the fee's adoption.

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[6] Ehrlich, supra, 911 P.2d 429, 447.

The new home buyer is not required to receive notice of a legislatively adopted fee and therefore is not able to become involved in the "political process."

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."
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> *Bi-Metallic Co. v. Colorado* 239 U.S. 441, 445 (1915).
>
> [O]nly those governmental decisions which are adjudicative in nature are subject to procedural due process principles. Legislative action is not burdened by such requirements.
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> *Horn v. County of Ventura*, 596 P.2d 1134, 1137 (1979); *see also, Mullane v. Central Hanover Trust Co.* 339 U.S. 306, 313 (1950).

Elected officials and current residents, aware of this fact, often argue in favor of the adoption of fees which pay for public facilities not entirely, or not in the least, caused by new development. Elected officials realize that since the ultimate fee payor is not currently a constituent and has not received notice, he or she is unlikely to express his or her displeasure with the fee by voting the decision maker out of office.[7] In addition, the current residents, looking out for

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[7] *See, e.g., California Building Industry Association v. Governing Board of Newhall School District*, 206 Cal.App.3d 212, 218 (1988) (" . . . the exactions were imposed not on an electorate which, unsurprisingly, voted overwhelmingly to approve them, but rather

(footnote continues)

their own interests, generally believe that it is better for new residents, rather than themselves, to pay for such facilities. As a result, the risk of extortion for generally applicable fees is just as high, if not higher than it is for those which are individually imposed.

A legislatively adopted fee may be adopted years prior to its actual imposition and on an entire city or county. Fees imposed on adjudicatory land use approvals occur closer in time to the purchase of a new home and on a geographically specific project and are therefore more likely to provide notice to the new home buyer. It seems ironic that the new home buyer should be provided greater protection from extortionate fees where he or she is more likely to receive notice than otherwise.

3. Deference To Legislative Acts Does Not Require Ignoring The Takings Clause

In part, the distinction made by the California Supreme Court is based on the greater deference paid to a public agency's legislative, as opposed to adjudicative, actions based on the separation of powers doctrine. Yet, nowhere does this greater deference require judicial review of such a fee to ignore the Constitution.

In a recent decision, *U.S. v. Winstar Corp*, 1996 U.S. LEXIS 4266 (July 1, 1996) (hereinafter "*Winstar*"), this Court stated that complete deference to a legislative assessment is not appropriate when the state's self-interest is at

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(footnote continued)

solely on the developers of new residential projects."); *Stubblefield Construction Co. v. City of San Bernardino*, 32 Cal.App.4th 687, 711 (1995) *cert. denied* 116 S.Ct. 300 ("It is not uncommon or unusual for a legislator to oppose a project and to use all means within his or her power to defeat it. After all, a legislator is supposed to respond to the concerns of his or her *constituents* . . . Whether their concerns were proper or justified is not the issue here. The point is that their elected representative decided to oppose the project, and did so vigorously." Emphasis added.).

stake. *Id.* at *100, fn. 41. The Court further noted that a stricter level of scrutiny applies in such cases. *Id.* The Court characterized self-interest as an:

> [I]nstance in which the government seeks to shift the costs of meeting its legitimate public responsibilities to private parties. [Citation omitted.] The government may not 'force some people alone to bear public burdens which . . . should be borne by the public as a whole.'[8] *Id.*

The Court's clarification was in response to the government's claim that the Sovereign Acts Doctrine applied and therefore absolute deference must be accorded to the Legislature's public and generally applicable act.[9]

Although *Winstar* applied the prohibitions of a different provision of the U.S. Constitution, i.e., the Contract Clause, this Court found that the deference generally granted to legislative determinations is not applicable where the interpretation or application of a Constitutional provision is at issue. As this Court has stated, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Nixon v. United States*, 506 U.S. 224, 238 (1993).

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[8] The Court also cited *Dolan* for this proposition noting that all regulations have their costs. *Winstar, supra*, at *76-77. As this Court noted, *supra*, the exactions in *Dolan* were based on legislative enactments.

[9] The government in *Winstar* argued that a standard almost identical to the *Agins* test should be applied to the public and general act of the legislature, i.e., whether the act "advance[s] the general welfare." *Winstar Corp., supra*, at *93-94. The *Ehrlich* Court suggested that the test for legislative actions should be whether they substantially advance a legitimate governmental purpose. As this Court rejected the test proffered by the government in *Winstar*, so should it reverse the California Court's deferential standard applied to legislatively enacted, generally applicable fees.

In applying minimum scrutiny to fees imposed on a broad class of people, the California Supreme Court essentially said that "the frequent and widespread nature of unconstitutional acts will transform them into constitutional acts." This bizarre conclusion was commented upon by Justices Thomas and O'Connor, *supra*, in *Parking Association of Georgia, Inc. v. City of Atlanta*, Georgia 115 S. Ct. 2268 (1995).

D. LOCAL GOVERNMENT SHOULD NOT BE COMPENSATED FOR THE LOSS OF A PRIVATE RECREATIONAL FACILITY

Much of the briefing at the California Supreme Court in this case focused attention on the fact that the fee was requested to mitigate an impact to the *public* based on the loss of a *private* recreational facility. The California Supreme Court stated, without citing any authority, "[t]his principle — that the discontinuation of a private land use may have distinctly *public* consequences — is well accepted in land use law."[10] The California Supreme Court's opinion regarding impacts to the public appears to have turned the Fifth Amendment on its head. In essence, the Fifth Amendment has been rewritten by the *Ehrlich* Court to state, "nor shall public property be taken for a private use without just compensation" where the public property taken is now a vested right to the maintenance of the current zoning in perpetuity. The Court said, "[t]he *opportunity* of Culver City residents to use such private recreational facilities created a public benefit by enlarging the *availability* of such facilities."[11] Therefore, public agencies might have a compensable (vested) right to *opportunities* presented by zoning designations. Similarly, public agencies would have a right to the continuing operation of a facility once it is built since that is what "*availability*" connotes.

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[10] *Ehrlich, supra*, 911 P.2d 429, 446.

[11] *Ehrlich, supra*, 911 P.2d 429, 447.

What the California Supreme Court did in the passage just cited was to impose on property owners the responsibility for continuing to provide zoned uses or pay to make a change to the zoning designation. It seems that the California Court has now accomplished indirectly what could not be accomplished directly, i.e., the property owner must now pay compensation. This is contrary to the Fifth Amendment as well as this Court's precedent, "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922).

With the *Ehrlich* decision, a new property right has been judicially created and an existing property right has been diminished. Two members of this Court are on record as supporting review on the issue of a state's redefinition of traditional property rights to avoid compensation:

> As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, [Cit. Omit.] neither may it do so by invoking non-existent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a State court chooses to denominate "background law" — regardless of whether it is really such — could eliminate property rights. "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." [Cit. Omit.] No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.

Stevens v. City Of Cannon Beach 114 S. Ct. 1332 (1994) (Scalia, J., and O'Connor, J., dissenting).

Historically, private property owners have not had a vested right to existing zoning because "the rights preserved to the individual . . . are held in subordination to the rights of society." *Viso v. State of California* 92 Cal.App.3d 15, 20 (1979). That is to say that the common good trumps private goods which nobody will deny. "The most fundamental principle of government — that it exists primarily to provide for the common good." *Cotton Petroleum Corp. v. New Mexico* 490 U.S. 163, 190 (1989) . Thus all laws should be directed towards the common good. Yet while the common good is the goal of law, this important end does not justify any means. Indeed, the Constitution places limits on the means to be chosen.

> [T]here are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the *common good*, that is, to leave his property economically idle, he has suffered a taking.

Emphasis added. *Lucas v. South Carolina Coastal Council* 505 U.S. 1003, 1019 (1992); *Goldblatt v. Hempstead* 369 U.S. 590, 594-595 (1962). Thus, while the common good grants the power to regulate land use, the Fifth Amendment provides that just compensation is a limit on the means by which it can be accomplished.

The decision of the California Supreme Court in *Ehrlich* has done nothing less than establish a public interest in zoning which triggers compensation to a local government upon rezoning. Regardless of the motivation for doing so, the Fifth Amendment necessarily limits the means which can be used to control the use of land.

CONCLUSION

Therefore, for the reasons stated above and in the Brief for Petitioners, the Building Industry *Amici* pray that this Court grant certiorari and affirm in part the California Supreme Court's opinion applying *Dolan* to monetary exactions and reverse in part by applying *Dolan* to legislative actions and prohibiting a public vested right in the use of private property.

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September 5, 1996

Supreme Court, U.S.
FILED
SEP 6 1996
CLERK

No. 96-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965, Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, AND PAUL A. JACOBS,

Respondents.

Petition For Writ Of Certiorari To The California Supreme Court

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE NATIONAL ASSOCIATION OF HOME BUILDERS ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of the petition for writ of certiorari and have filed the letters of consent with the Clerk of the Court.

I.

THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO WHEN THEY CAN BE REQUIRED TO DEDICATE LAND OR PAY MONEY TO A LOCAL GOVERNMENT AS A CONDITION OF A LAND USE APPROVAL

The NAHB represents over 185,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that deals with the circumstances under which a landowner may be forced to dedicate land, pay money, or provide services as a condition of a land use approval. More specifically, its members need to know, in advance, what costs they are likely to incur as part of the land development process.

The NAHB has been before the Court as an amicus curiae or as "of counsel" to the property owners in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Commission*,

483 U.S. 825 (1987),[1] and *Dolan v. City of Tigard*, - U.S. -, 114 S.Ct. 2309 (1994).

The NAHB submits its amicus curiae brief in support of the petitioner in the present case in order to assist the Court in determining whether to grant its writ of certiorari to clarify the circumstance under which the heightened scrutiny demanded by *Dolan* applies; i.e., when is a municipality required to make an individualized determination of whether rough proportionality exists between the exactions demanded as a condition of the approval of new development and the impacts created by the new development. Its determination is particularly necessary at the present time because of the importance of the issue presented and the current uncertainty resulting from the differing views of the applicability of *Dolan* amongst state courts.

II.

SUMMARY OF THE ARGUMENT

Dolan held that a municipality bears the burden of demonstrating, through an individualized determination, that a rough proportionality exists before an exaction requiring the dedication of land and the impacts created by new development can be upheld when the exaction has been made a condition of an adjudicative land use approval. *Dolan* did not address the issue of whether a municipality bears a similar obligation — and courts are to subject a municipality's actions to a higher level of scrutiny — when an exaction is imposed as a condition in an adjudicative context but does not involve the dedication of land, i.e., when it involves the payment of money or the provision of services, nor did it address the question of what happens when the exaction is imposed legislatively to a whole class of approvals.

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[1] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

State courts handle the bulk of land use cases but they haven't a clue as to what they are supposed to do when presented with an exaction condition in circumstances that are not on all fours with *Dolan*. As a result, their decisions are all over the place. Some state courts have limited *Dolan* to its facts; others have extended it.

Dolan answered only one portion of the important federal constitutional question of when government is entitled to force a landowner to provide private property to the public in the land use approval context. Although only two years old, *Dolan* has already formed the rule of decision for numerous cases but without any uniform understanding by the state courts of when the heightened scrutiny required by *Dolan* applies. Costs, once known, can be dealt with; uncertainty is a killer. Only the Court's explanation of what it intended in *Dolan* will provide the certainty that lower courts and landowners need and deserve. That is why the court should grant the petition for certiorari now pending.

ARGUMENT

III.

THE PETITION FOR WRIT OF CERTIORARI PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT.

A. The Use And Regulation Of Land Present Important Questions Of Law.

The petition now pending before the Court should be granted because it presents a federal constitutional issue having to do with how far government can go when it regulates private property, an issue of great importance that has been frequently worthy of the Court's expenditure of its limited time and resources in the past. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Village*

of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The petition involves the specific issue of under what circumstances government can demand that private property be provided to the public as part of the land use approval process — an important subset of the more general issue of the limits of the governmental right to regulate the use of land. The public's desire for access to private property, even for the worthiest of reasons, is not enough to justify a demand that a landowner make his or her property available to the public. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, - U.S. -, 114 S.Ct. 2309 (1994). This follows, of course, from the fact that the Takings Cause of the Fifth Amendment is entitled to as much respect as the other parts of the Bill of Rights. *Dolan*, supra, 114 S.Ct. at 2320.

B. The Extent Of Governmental Power To Require Exactions In The Land Use Context Is Of Vital Importance To Landowners.

The literature on exactions in the land use context is voluminous[2] because the subject of exactions in the land use

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[2] See, e.g., 4 Anderson, American Law of Zoning, Ch. 25, Subdivision Controls (3d ed. 1986 and Dec. 1995 Cum. Supp.); Kushner, Subdivision Law & Growth Management, Ch. 6, Financing Capital Improvements (1996); 5 Williams, American Planning Law, Chs. 156, Subdivision Control, and 156A, Impact Fees (1988 rev. and Aug. 1995 Cum. Supp.); 5 Ziegler, Rathkopf's The Law Of Zoning & Planning, § 65.04, Development Conditions, Improvements, Exactions, and Impact Fees (1996); Abbott, Moe & Hanson, Public Needs & Private

(footnote continues)

context is important. Economists may argue as to who ultimately bears the costs of the exactions — see Mandelker, Cunningham & Payne, Planning and Control of Land Development 600-601 (4th ed. 1995) — but nobody contests the fact that those costs exist. Exactions go to the developer's bottom line and the developer's ability to make a profit. No profits, no development. No development, no new homes, office buildings, stores, or factories.

Nor does anyone contest the reason why exactions have become even more important than they were in the past: government, at every level, simply does not have enough money to do all of the things that the public wants done and people are not eager to tax themselves to provide all of the things which society requires. "Not In My Backyard": Removing Barriers to Affordable Housing 2-10-12 (1991). The result is predictable: the burdens of society are shifted to a small group — landowners who need land use approvals — thus sparing the majority from having to assign priorities to various needs.

Given that needs exist and resources are limited, the question becomes one of when (not if) developers can be required to solve public problems with private funds and, when exactions can be imposed, how large the resulting costs are going to be.

Landowners and developers are rational economic beings. They can deal with exactions, even large ones, if they

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(footnote continued)

Dollars (1993); Altshuler & Gómez-Ibáñez, Regulation for Revenue: The Political Economy of Land Use Exactions (1993); Nicholas, Nelson & Juergensmeyer, A Practitioner's Guide to Development Impact Fees (1991); Alterman, Evaluating Linkage and Beyond: The New Method for Supply of Affordable Housing and Its Impacts (1989); Frank & Rhodes (eds), Development Exactions (1987); Symposium, Exactions: A Controversial New Source for Municipal Funds, 50 Law & Contemp. Prob. 1 (1987); and Synder & Stegman, Paying for General Growth: Using Development Fees to Finance Infrastructure (1986).

know what to expect. Reasonable business decisions can be made when costs are fairly well known. However, no business person can make plans and projections which hope to bear any relationship to reality when there is no predictability and costs are a sometime thing. Predictability of outcome — even an adverse outcome — is better than uncertainty for all concerned. Without that predictability, decisions cannot be made or, if made, there is an increased chance that they will be made poorly, resulting in wasted or underutilized resources.

The only way that predictability can be restored on a nationwide basis is for the Court to grant the petition and tell the business and legal world what *Dolan* really means.

C. *Dolan* Solved Only One Part Of The Puzzle.

In *Dolan*, the City of Tigard imposed a condition which required the landowner, Mrs. Dolan, to dedicate a portion of her property to the public for flood control and traffic improvements. (114 S.Ct. at 2312.) The Court refused to allow Mrs. Dolan to be deprived of her land based only on an attenuated relationship between impact and mitigation. Instead, the Court held that the City was required to demonstrate, through an individualized determination, that a rough proportionality existed between the impact of Mrs. Dolan's expanded hardware store and the mitigation — land to be deeded to the public — which the City had imposed as a condition of the approval of that expansion. (114 S.Ct. at 2319-2320.)

In other words, *Dolan* provided a rule of decision in a case where a condition imposed on an ad hoc basis required the dedication of land; it said nothing as to what the rule of decision would be had the City required the payment of fees or the provision of services nor did it address the question of what the rule of decision would be had the dedication requirement been imposed by means of a legislatively

adopted requirement — one that would have been imposed generally in a particular class of land use approvals.

As shown in the next subsection, state courts around the nation have been unable to come to a common conclusion as to when *Dolan's* heightened scrutiny applies. Uncertainty reigns supreme and will continue to do so until the Court speaks and tells the business and legal world what *Dolan* really means.

D. The State Courts Are Already In Massive Disagreement As To The Extent Of *Dolan*.

Dolan was an important case because land development is an important component of the national economy.[3] Courts have had to deal with its importance; a Westlaw search shows that, in the two years since *Dolan* was handed down, it has been cited over 40 times by federal courts and over 65 times by state courts. The same search also showed that *Dolan* has been cited in more than 340 law review articles demonstrating its importance to commentators. As might be expected with so many citations, different readers of the case have come to different conclusions.

In particular, the state courts have no idea as to whether *Dolan's* heightened scrutiny is to be applied to exactions which do not require the dedication of land or which have been imposed legislatively.[4]

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[3] Just under 50% of annual domestic private investment is in real estate. Miles, Haney & Berens, Real Estate Development: Principles and Process 35 (1996). The value of new residential, commercial and industrial construction is estimated to be in excess of $250 billion for 1996. U.S. Department of Commerce, Construction Review Quarterly Industry Report, Table 2 (Fall and Winter 1995-96). Real estate, as an industry, employs approximately 1.3 million workers; another 4.6 million workers are employed in construction. Miles, Haney & Berens, supra.

[4] There is an additional question of whether *Dolan* applies when a land use regulation does not involve an exaction. See, e.g., *Parking*

(footnote continues)

No lower court has had any problem dealing with a case where a condition imposed as part of an adjudicative decision required the dedication of land. That is, however, where the agreement ends.

Does *Dolan* apply when an exaction involves something other than land? Some courts say yes, others no.

The case for which a writ of certiorari is being sought held that it applies to money. *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 859, 50 Cal.Rptr.2d 242, 246, 911 P.2d 429, 433 (1996). *Clark v. City of Albany*, 137 Or.App. 293, 299, 904 P.2d 185, 189 (1995), rev. denied, 322 Or. 644, 912 P.2d 375 (1996), *J.C. Reeves v. Clackamas County*, 135 Or.App. 615, 623, 887 P.2d 360, 365 (1994), both held that the heightened scrutiny required by *Dolan* applied when a developer was required to improve adjacent public streets.

On the other hand, *McCarthy v. City of Leawood*, 257 Kan. 566, 579, 894 P.2d 836, 845 (1995), and *Waters Landing Limited Partnership v. Montgomery County*, 337 Md. 15, 39, 650 A.2d 712, 724 (1994), held that the heightened scrutiny required by *Dolan* did *not* apply where the exaction required the payment of money.[5]

(footnote continued)

Association of Georgia, Inc. v. City of Atlanta, - U.S. -, 115 S. Ct. 2268 (1995) (Thomas, J., dissenting). In as much as the petition now pending before the Court involves an exaction, nothing more will be said about non-exaction situations.

[5] Most land use cases are brought in state courts because of the desire of federal courts to avoid acting as super boards of zoning appeals. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting); *River Park, Inc. v. City of River Park*, 23 F.3d 164, 165 (7th Cir. 1994); and *Studen v. Beebe*, 588 F.2d 560, 562 (6th Cir. 1978). Even so, at least one lower federal court has already held that *Dolan* is inapplicable where the exaction consists of money. *Garneau v. City of Seattle*, 897 F.Supp. 1318, 1325 (W.D. Wash. 1995). It is probably fair to say that other lower federal courts will have to deal with the extent of *Dolan* in the near future.

State courts are also split as to whether an exaction imposed as the result of a legislatively adopted rule of general application is governed by *Dolan's* requirement of heightened scrutiny. *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill.App.3d 926, 939, 661 N.E.2d 380, 389-390 (1995), app. denied, 167 Ill.2d 549, 667 N.E.2d 1055 (1996), *J.C. Reeves Corp.*, supra, 131 Or.App. at 623, 887 P.2d at 365, and *Schultz v. City of Grants Pass*, 131 Or.App. 220, 226-227, 884 P.2d 569, 572-573 (1994), all held that *Dolan* applies when the exaction is imposed through a legislative enactment. Further, Justice Mosk, in his concurring opinion in *Ehrlich*, argued that "even generally applicable laws which authorize the physical occupation of the property are takings . . ." (12 Cal.4th at 901, n.4, 50 Cal.Rptr.2d at 249, n.4, 911 P.2d at 460, n.4)

On the other hand, the majority in *Ehrlich* stated that legislatively imposed exactions would not be subject to *Dolan's* heightened level of scrutiny. (12 Cal.4th at 876, 50 Cal.Rptr.2d at 257, 911 P.2d at 443-444.) This is the same position taken in *Loyola Marymount University v. Los Angeles Unified School District*, 45 Cal.App.4th 1256, 1271, 53 Cal.Rptr.2d 424, 435 (1996), *San Mateo Coastal Landowners' Association v. County of San Mateo*, 38 Cal.App.4th 523, 548-549, 45 Cal.Rptr. 2d 117, 131-132 (1995), *Southeast Cass Water Resource District v. Burlington Northern RR*, 527 N.W.2d 884, 896 (N.D. 1995), and *Waters Landing*, supra, 337 Md. at 39, 650 A.2d at 724.

State courts of last resort and lower state appellate courts are all wrestling with what the Court meant in *Dolan*. In the two years since the Court handed down its decision in *Dolan*, courts of last resort all over the country have come to diametrically different results based on widely differing understandings of its reach. The situation is not likely to get any better — and the uncertainty is not likely to be reduced — in the near future unless the Court grants the

petition and tells the business and legal world what *Dolan* really means.

IV.

CONCLUSION

The Court's decision in *Dolan* was of constitutional magnitude; its application should be uniform throughout the United States regardless of whether a case is brought in a federal or a state court. The courts today are like the proverbial team of blind men trying to describe an elephant. The differences in the interpretation of *Dolan's* reach means that the result in a particular case which goes anywhere beyond the dedication of land in an adjudicative context is a function of where the land is located and the case is brought. That is no way to implement a rule of constitutional dimensions.

In some courts, the heightened scrutiny required by *Dolan* will apply even though the exaction consists of money or services; in others, it will apply only if the exaction consists of the dedication of land. In some courts, the heightened scrutiny required by *Dolan* will apply even though the exaction has been imposed at a legislative level. In others, it will apply only if the exaction is imposed on an ad hoc basis.

Rarely has a decision by this Court received so many different interpretations by so many in such a short time. All of those involved with the process — the staffs of the municipalities who are going to have to decide what exactions can legitimately be imposed, the landowners who are going to have to satisfy those exactions, the lawyers who are going to have to advise both the municipalities and the landowners, and the judges who are going to have to decide the validity of the exactions — need and deserve the Court's guidance as to what circumstances invoke *Dolan's* heightened scrutiny. The uncertainty must, and can be, resolved by granting Mr. Ehrlich's petition for writ of certiorari.

Accordingly, the NAHB respectfully requests that the Court grant Mr. Ehrlich's petition.

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Supreme Court, U.S.
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No. 96-238

In The

Supreme Court of the United States

October Term, 1995

RICHARD K. EHRLICH, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust,

Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARIDES, PAUL A. JACOBS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF IN OPPOSITION

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35 pp

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QUESTIONS PRESENTED FOR REVIEW

The questions as framed by the petitioner seriously misstate the opinion of the California Supreme Court and the issues before this Court. The questions presented by the petition are more properly stated as follows:

> Whether a claim that the imposition of a recreation fee constitutes a "taking without a payment of just compensation" under the Fifth Amendment presents a "final judgment" within the meaning of 28 USC § 1257, where the California Supreme Court has remanded the claim to the respondent public agency and the lower courts of the State to determine "what, if any, recreational fee the evidence might justify."

> Can the issue of whether an ordinance requiring a developer to commit one percent (1%) of the value of his proposed improvements to public art constitutes a "physical taking" under the Fifth Amendment, which was not pressed or passed upon in the lower courts, be raised for the first time in the petition?

> If the first question presented is answered in the affirmative, then may a public agency under *any* circumstances condition the grant of a discretionary upzoning of property on a requirement that a developer pay a fee as a partial mitigation of the impacts caused by the upzoning?

> If the second question presented is answered in the affirmative, then should this Court reverse its unanimous decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992), and instead hold that regulation designed to preserve a community's aesthetics is a *per se* taking under the Fifth Amendment?

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BRIEF IN OPPOSITION

Respondents, City of Culver City, City Council of the City of Culver City, Steven Gourley, Jozelle Smith, James Boulgarides, Paul A. Jacobs, in their official capacities as members of the city council (hereinafter "Culver City") respectfully request this Court deny the Petition of Richard K. Ehrlich, as Trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965 Trust (hereinafter "Petitioner") for a writ of certiorari seeking review of the opinion of the California Supreme Court in *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996).[1]

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1,[2] Culver City presents the following statement of the case to address the petitioner's omissions and to supplement the statement of the case presented by the petitioner.[3] Except for a

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[1] Pursuant to Supreme Court Rule 35.3, the petitioner should have substituted the current council members for those named herein. None of the individuals named herein are still members of the city council.

[2] Respondents' Brief in Opposition is timely pursuant to Supreme Court Rule 15.2. The petition was placed on this Honorable Court's docket on August 14, 1996.

[3] The petitioner goes to great lengths to persuade this Court with numerous inappropriate citations to (i) the first opinion of the Court of Appeal (Appendix G to the petition) which was voided by that court's grant of rehearing, (ii) the second opinion of the Court of Appeal (Appendix E to the petition) which was vacated by this Honorable Court [*Ehrlich v. City of Culver City*, 512 U.S. ___, 114 S. Ct. 2731 (1994)] and (iii)

the passing reference in footnote 1 on page 2 of his petition, petitioner has omitted any statement about the current procedural posture of the case below. Likewise, the petitioner has failed to explain that none of the myriad challenges brought to date and addressed by any court involving this matter has related to whether Culver City's art program would constitute a physical intrusion on the petitioner's property. Further, the petitioner failed to accurately describe Culver City's art program. In addition, the petitioner never made any attempt to seek modification of the type and extent of recreational uses permitted on the subject property. Finally, the petitioner failed to note that Culver City could not approve the petitioner's requested residential land-use approvals unless Culver City also approved an amendment to its General Plan.

A. Procedural Posture of This Case.

This matter is still pending in the trial court. The California Supreme Court has ordered this matter returned to Culver City for further proceedings.

> It is thus appropriate to return the case to the city to reconsider its valuation of the fee in light of the principles we have articulated. Remand to the city was apparently what occurred in *Dolan* itself after the case was returned to the Oregon Supreme Court. (*See, Dolan v. City of Tigard* []

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the third opinion of the Court of Appeal (Appendix C to the petition) which was voided when the California Supreme Court granted review. Cal. Rules of Court Rule 29.2(a).

877 P.2d 1201 [1994]) [the case is "remanded to the City of Tigard for further proceedings."]

Ehrlich v. City of Culver City, 12 Cal.4th 854, 885 (1996); Petition Appendix A, p. A44.

On August 15, 1996, pursuant to the trial court's order of August 6, 1996, Culver City filed a proposed alternative writ of mandate (the "Proposed Writ"). On August 22, 1996, the petitioner filed objections to the Proposed Writ. On August 29, 1996, Culver City filed responses to those objections. On September 26, 1996, the trial court has scheduled a continued hearing on petitioner's request for attorney's fees. Culver City anticipates that the trial court will likewise discuss the Proposed Writ at that time.

Once the matter is finally remanded to Culver City in accordance with the California Supreme Court's direction, as noted above, Culver City must then reconsider the appropriate amount of the mitigation fee. If upon remand the city council were to decide that the facts do not support any amount of mitigation fee, then no justiciable controversy would remain in this case. If upon remand, the city council were to impose some amount of a fee, then, upon the petitioner's challenge, that determination would first be reviewed by the trial court. Therefore, this Honorable Court should refrain from reviewing this matter until that remand is complete.

B. The Allegation of Physical Invasion of Private Property Has Been Raised for the First Time in the Petition.

For the first time in the seven years this case has been at issue, the petitioner has alleged that Culver City's art program should be considered a physical invasion or appropriation of real property. The petitioner's original pleadings in this matter alleged eleven causes of action, none of which included claims that a physical invasion had occurred. Likewise, in three prior appearances before the California Courts of Appeal, two prior appearances before the California Supreme Court and one prior appearance before this Honorable Court, the petitioner never argued that Culver City's art program constituted a physical taking of real property. Nor has any court ruled upon such issue.

C. The Art Program.

The California Supreme Court accurately described Culver City's art in public places program.

> By municipal ordinance, new residential development projects of more than four units, as well as all commercial, industrial, and public building projects with a building valuation exceeding $500,000, are required to provide "art work" (as defined by the ordinance) for the project in an amount equal to 1 percent of the total building valuation, or pay an equal amount in cash to the city art fund.

Ehrlich, supra, at p. 862; Petition Appendix p. A7. Under the ordinance, the art work placed on the site remains the

property of the developer. *See*, Culver City Municipal Code Section 33H-31(a); Petition Appendix N, p. N9. Based on the foregoing, if a developer chooses to comply with the art program by placing art work on the development site, that art work does not become a "public art project", any more than would a city-imposed specific design requirement for a certain style of architecture for a new building. Additionally, it is the developer's sole option to determine whether to place art work on the project site or pay an in lieu fee. To date, no court or dissenting justice has found any dispute with the original trial court's ruling upholding the art program.

D. The City Was Not Required to Approve the Townhome Project.

The California Supreme Court stated that:

> The record before us indicates that private recreational facilities were in scarce supply in the city and merited preservation and promotion. As the 1988 city staff analysis of [petitioner's] proposed project noted, "Culver City as a fully-developed urban city has very little open space in which to develop parks and related recreational facilities. By national standards . . . the City is deficient in park space, tennis courts, swimming facilities, gymnasiums and the recreational activity centers needed to maintain and enhance the 'quality of life' in our community."

Ehrlich, supra, at p. 882; Petition Appendix A, p. A39.

It is clear that some type of recreational use was needed and could be operated on the subject site.[4] In fact, it would have been a use similar to that which the petitioner had requested at the time he originally purchased the site. *Id.*, at pp. 860-861; Petition Appendix, pp. A3-A4. Therefore, the petitioner's investment-backed expectations would have been met and an economically viable use would have been permitted for the site, had Culver City denied petitioner's request to change the land use in order to build townhomes.

Notwithstanding the foregoing facts, the petitioner never requested permission to modify the existing land use restrictions to redevelop the site for more competitive recreational facilities. In fact, from 1974 through 1988, except for the subject townhome project, the petitioner requested permission to develop only one other use on the site. In 1981, petitioner requested permission to construct an office building. That request was presented to the Planning Commission. The Planning Commission recommended denial, and the petitioner abandoned that application. *Id.*, at p. 861; Petition Appendix A, p. A4.

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[4] The economic feasibility study prepared by the City "concluded that [petitioner's] club had encountered financial problems through a combination of management problems, poor maintenance, and a lack of competitive amenities offered by other clubs. Without extensive capital improvements, the study concluded the club could not 'compete financially in today's health and fitness market.' " *Ehrlich, supra,* at p. 861; Petition Appendix A, p. A5.

E. Culver City Was Required to Approve a General Plan Amendment before It Could Approve the Townhome Project.

One of the land use approvals requested by the petitioner in 1988 (which led to the approval of the townhomes) was a General Plan amendment. *Ehrlich, supra*, at p. 861; Petition Appendix A, p. A4. The General Plan land use designation for the subject property prior to Culver City's actions to approve the townhome project was commercial. Before it could approve the townhome project, Culver City had to approve a tentative and final tract map pursuant to the Cal. Subdivision Map Act; Cal. Government Code §§ 66410, *et seq.*, specifically, Section 66426. Pursuant to the Subdivision Map Act, Culver City could not approve the subject project unless it could make a finding the project was consistent with Culver City's General Plan. Cal. Government Code § 66474. In order to make such a finding, Culver City had to redesignate the petitioner's property from the General Plan land use designation of commercial to one permitting residential. Therefore, notwithstanding the petitioner's claims to the contrary (the petition at p. 6), the townhome project was not consistent with the existing General Plan.

REASONS FOR DENYING THE PETITION.

I.

THE CASE IS NOT PROPERLY BEFORE THIS HONORABLE COURT

A. The Entire Matter Regarding the Recreation Fee Is Still Pending in the Trial Court.

The California Supreme Court has remanded this matter to the lower courts with directions to remand the matter to Culver City for reconsideration. That reconsideration will include an application of the test required by the Just Compensation Clause of the Fifth Amendment as interpreted by this Honorable Court in *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309 (1994) and the California Supreme Court in *Ehrlich, supra*. Until that reconsideration is completed and the highest California court has ruled on the appropriateness of any fee Culver City may impose, no final judgment will have been entered in this case and the federal question whether Culver City has taken private property without payment of just compensation, will remain unresolved. Without a final judgment, this Honorable Court has no jurisdiction to hear this matter. 28 USC § 1257.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), this Honorable Court reiterated that there are but a few exceptions which permit this Court to grant certiorari when a final judgment has not been rendered below. *Cox* discusses the four categories of exceptions.

The first category deals with those situations where the federal issue has been conclusively determined or that conclusion is preordained. *Cox, supra*, at 479. As

described previously, that factor is not found in the instant case. The California Supreme Court has directed Culver City to reevaluate the mitigation fee based upon the principles articulated by that court. *Ehrlich, supra,* at p. 885; Petition Appendix A, p. A44.

> Following remand, the city must determine whether and to what extent approval of plaintiff's requested land use changes justify the imposition of a recreation fee as a means of compensating it for the additional costs of attracting the development of comparable recreational facilities for its residents. The determination of such a fee will, of course, require the city to make specific findings supported by substantial evidence – that is, the city "must make some effort to quantify its findings" supporting any fee, beyond "conclusory statements," although "[no] precise mathematical calculation is required" . . . . (*Dolan, supra,* 512 at p. ___, 114 S.Ct. at p. 2322.)

Ehrlich, supra, at p. 885; Petition Appendix A, p. A44.

Based on the foregoing, it is clear that the first *Cox* exception to 28 USC § 1257 does not apply. The federal issue in this matter has not been conclusively determined nor is such conclusion preordained.

The second category of exceptions are those in which no matter what the outcome of the lower courts, the federal issues survive and require decision by this Court. *Cox, supra,* at p. 480. After remand to Culver City, one of three things will happen.

First, Culver City may determine that no fee could be supported, therefore, no fee would be imposed. If that

happens, then no further judicial determination as to whether a regulatory taking has occurred would be necessary and this matter would be moot.

Second, Culver City could impose a fee which the petitioner may accept. If that occurs, then there would be no justiciable controversy remaining and this matter would again be moot.

Finally, Culver City could impose a fee which the petitioner might resist. If that happens, then the matter would be returned to the trial court for a determination of whether the fee constitutes a taking of private property without payment of just compensation. Based on the foregoing, there are two possible outcomes after remand which will not require any review by this Honorable Court. Therefore, the second *Cox* exception does not apply.

The third category of exceptions are those cases where the federal claim has been finally decided but the further proceedings on the merits in the state courts will preclude review of the federal claim no matter what the outcome of the case. *Id.* at p. 481. As stated previously, the federal claim has not been finally decided. However, even assuming it had been, this exception still does not apply. As shown above, one of the possible outcomes in the matter below would permit the petitioner to retain his rights to seek this Honorable Court's review. Therefore, exception category number three does not apply.

Finally, the fourth category of exceptions relates to those cases where the federal issue has again been finally resolved but the further state court proceedings could be precluded by a different outcome on the federal issue. *Id.*

at p. 482. Here the only matter left to be resolved *is* the federal question. The petitioner's claims are based on the Just Compensation Clause of the Fifth Amendment. The California Supreme Court's remand directs Culver City to reconsider its imposition of the recreation fee based on principles required under the Fifth Amendment as it relates to claims of a regulatory taking. If the matter is returned to the trial court after Culver City's reconsideration, then that Fifth Amendment claim will likewise be reviewed and the petitioner will retain his rights to seek review from this Court after pursuing his case through the appellate system in California. Therefore, the fourth category of exception also is inapplicable.

Further support for the inapplicability of the four recognized exceptions to the jurisdictional requirement of 28 USC § 1257 can be found in the reasons for that requirement.

> The finality requirement of 28 USC § 1257 which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973). In the instant case, all three reasons for 28 USC § 1257 will be met by denial of the petition.

First, this Honorable Court is being requested to conduct a piecemeal review of the relevant issues. The petition asks for review of one-half of the issues involved in this case. This Court is being asked to review the state court's determination regarding the *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) half of the *Nollan/ Dolan* test before the state courts have reached a final decision on the *Dolan* half of the test. This request is clearly a "piecemeal" approach.

Second, this Court is also being asked to give what could very well be an advisory decision. As stated earlier, two of the three possible outcomes which may occur after the remand of the matter to Culver City will result in "no real case or controversy". With both of those outcomes, no further judicial review of the subject issues will be required.

Finally, if this Court grants review at this time, then it would intrude on the pending state proceeding. As noted before, the California Supreme Court has directed the trial court to issue an order directing Culver City to review the amount of the fee. Upon that review, if Culver City imposes a fee, then the petitioner might continue his challenge. That challenge would first be brought in the trial court and then proceed through the state appellate system. Those state court proceedings should be permitted to continue to final judgment without intrusion from the federal bench at this time.

In addition to the foregoing policy reasons, this Court should deny the petition in order to give full effect to its previous order in this matter. For the petitioner to prevail on his argument that this matter has reached a

final judgment in the courts below, the two-prong test established by *Nollan* and *Dolan* would be meaningless. The petitioner's argument would mean that no federal issue remains in dispute in this matter because the California Supreme Court has reached a conclusion about only the first prong of the *Nollan/Dolan* test. Petitioner's argument, in fact, even makes this Court's remand of the instant case "for further reconsideration in light of *Dolan* []" ineffectual. *Ehrlich v. City of Culver City*, 512 U.S. ___, 114 S.Ct. 2731 (1994). Clearly, this Court required the lower courts to reconsider both prongs of the test applicable to this type of regulatory taking claim.

Upon that reconsideration, the California Supreme Court has determined that the "essential nexus" prong of the *Nollan/Dolan* test has been met. Additionally, based on the facts it had before it, that court determined that Culver City had not met the "rough proportionality" prong of *Nollan/Dolan*. On that latter issue, the matter will be returned to Culver City for further proceedings, similar to what happened in *Dolan* itself after the case was returned to the Oregon Supreme Court. *See, Dolan v. City of Tigard*, 319 Or. 567 (1994).

Given that the second prong of the *Nollan/Dolan* test is not yet final either administratively or in the State's courts, accepting the petition would constitute a gross federal interference by this Court with ongoing state administrative and judicial functions. As the Chief Justice has written, the "final judgment" requirement serves an important role in preserving harmonious State-federal relations.

> I consider § 1257 finality to be but one of a number of congressional provisions reflecting concern that uncontrolled federal judicial interference with state administrative and judicial functions would have untoward consequences for our federal system. [Footnote omitted.]

Cox, supra, at p. 503 (Rehnquist, J., dissenting.)

The final judgment requirement has been a cornerstone of this Court's jurisprudence since 1789. As Justice Frankfurter has stated: "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945).

Moreover, even in *Cox,* the Court explicitly recognized that in cases involving the Fifth Amendment's takings clause, such as the case at bar, there is often an initial interlocutory decision involving a federal question with another federal question to be decided later by the state courts. But this Court held in *Cox* that:

> A state judgment is not final unless it covers both aspects of that integral problem. [Citations omitted.]

Cox, supra, at 479 n. 6.

In the case at bar, the petitioner has not yet received a final state judgment on the second aspect of the integral Fifth Amendment problem, *i.e.,* the amount of fee that may be constitutionally imposed on his development. As is discussed above, under several logical scenarios that issue may never become a "case or controversy." This is not the case to warrant further expansion of the "final

judgment" requirement and a reversal of long-standing authorities.

Based on all of the foregoing, at this time this Honorable Court does not have jurisdiction to hear this matter. A substantial federal issue remains to be decided and a "[f]inal judgment or decree [has not been] rendered by the highest court of a State in which a decision could be had . . . ." 28 USC § 1257 (a). That federal issue – whether the imposition of a fee meets Fifth Amendment protections against regulatory takings without just compensation – is the linchpin to the petitioner's entire claim in this matter. Therefore, this Honorable Court is respectfully requested to deny the petition.

B. Until This Petition, Allegations Regarding the Art Program Were Never Raised.

The petitioner has never, in all the years this matter has been winding its way up and down various levels of state and federal courts, alleged that Culver City's art program constituted a physical invasion of private property. Perhaps that is because it is clear that the art program does not constitute a physical invasion of property.[5]

The petitioner's complaint in the trial court only alleged that the art program unconstitutionally imposed a

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[5] In fact, during one of the appearances at the California Courts of Appeal, the petitioner's counsel indicated that had it not been for the recreation fee, the petitioner would not have challenged the art program. It seems untenable that the petitioner would have waived his arguments regarding the art program, if indeed it was an actual physical intrusion on his property.

fee. No allegations were made regarding the placement of art on the petitioner's property. This Honorable Court should not permit the petitioner, at this late date, to allege the art program somehow constitutes a physical invasion of private property.

In *Illinois v. Gates*, 462 U.S. 213 (1983), Chief Justice Rehnquist reiterated the importance of the rule against deciding claims "not pressed nor passed upon" in state court.

> [D]ue regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there.

Id., at p. 219.[6]

Here there is no doubt that the petitioner's original complaint did not raise the claim that a physical taking

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[6] In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court reiterated the *Illinois* rule before finding an exception to that rule because there were ambiguities in the complaint and lower court decisions as to whether the issue of both physical takings and regulatory takings had been raised. Notwithstanding the exception, this Honorable Court ultimately decided that the issue of regulatory taking had not been properly raised in the Yees' petition and, therefore, refused to hear that argument. In doing so, Justice O'Conner's opinion stated that: "While the regulatory taking question is no doubt important, from an institutional perspective it is not as important as the physical taking question." *Id.* at p. 537. Because of the importance of the physical taking question, the petitioner should have raised it below. If permitted to raise it now for the first time, then this Court would be permitting a party to circumvent having fundamental issues addressed in the lower courts.

had occurred. The petitioner only claimed that the fee imposed under the art program did not meet constitutional standards. There is also no doubt that no court has ruled on whether the art program could constitute a physical invasion. This may be because the petitioner had originally decided to pay the in lieu fee. However, even after changing his mind and placing art work on the townhome site, while still in the California Supreme and appellate courts and even before this Honorable Court in *Ehrlich v. Culver City*, 512 U.S. ___, 114 S.Ct. 273 (1994), the petitioner never raised the issue of a *per se* physical taking.

Actually, if a physical taking had been at issue then this Court's previous remand would have made no sense. That remand required the California Court of Appeal to reconsider its decision in light of this Court's decision in *Dolan*. As this Court is well aware, *Dolan* is not a *per se* takings case. Further, no reconsideration would have been needed if a *per se* taking had occurred.

In order to preserve the important policy reason, which gives rise to the "not pressed or passed upon" rule and which was reiterated by Chief Justice Rehnquist in *Illinois v. Gates, supra*, this Court is respectfully requested to deny the petition.

II.

MITIGATION OF THE IMPACTS FROM A LAND USE CHANGE IS A CONSTITUTIONAL EXERCISE OF A CITY'S POLICE POWER

The petitioner attempts to overturn 70 years of precedent with his argument that Culver City cannot mitigate the impacts resulting from a change of zoning. In *Dolan*, this Court noted the long line of cases [starting with the seminal case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)] which provide great deference to governmental land use regulations which do not entail physical intrusions into private property.

> A land use regulation does not effect a taking if it "substantially advances(s) legitimate state interests" and does not "den(y) an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). [Modifications original.]

Dolan, supra, at ___, 114 S. Ct. at p. 2316.

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

Culver City has clear authority to plan its community for various uses, including recreational facilities which the city council has determined are necessary for the

public health and welfare. This is a fundamental authority every city has under its police power. *Village of Euclid, supra; Keystone Coal Association v. DeBenedictis,* 480 U.S. 470 (1987); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). Based on the foregoing long-recognized authority, the City can regulate the use of land within its jurisdiction in such a way as to provide the community with the *opportunity* for the placement of housing in certain areas, commercial and industrial uses in other areas and recreational facilities on the subject site.

This is true even if, as in this case, the property owner no longer wants to provide the recreational use provided by Culver City's land use approvals. This authority is no different from the Culver City's power to require certain properties to be designated solely for rental housing for low- and moderate-income residents, television and movie studios, stadiums, or a regional shopping mall. A property owner's options would be (i) to leave the land fallow and exclude all others from it, (ii) to use the property for a similar use subject to the approval of any necessary modification or (iii) to sell the property to another to be used as authorized or with modifications, but for the same use. This developer had the exact same options. It is also clear from the record that all three of the above options provided an economically viable use for the subject site and that use was well within the property owner's investment-backed expectations. *Ehrlich, supra,* 12 Cal.4th at pp. 860-861, 882; Petition Appendix A, pp. A4-A5, A39.

The foregoing authority is even more applicable in this case because a General Plan amendment was

required. As stated previously, under long-standing California law, in order for the subject townhome project to be approved, Culver City had to approve a subdivision map. Cal. Government Code Section 66426. Culver City could not approve that map unless it could also find that the proposed project was consistent with the city's General Plan. Cal. Government Code Section 66474. To be able to make that required finding, Culver City had to amend its General Plan so that the land use designation for the subject property could be changed from commercial to residential. The importance of the General Plan in California has been clearly stated by the California Supreme Court. The General Plan is the "constitution" or "charter" for future development in California cities. *Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531 (1990). Pursuant to the foregoing, Culver City could not approve the townhome project without a General Plan amendment.

It is also important to note that the commercial land use designation was the result of a 1974 request from the petitioner to change the designation so that the recreational facilities could be built. Under that commercial designation, Culver City could have permitted many different non-residential uses on the site, including recreational uses. In determining whether land-use regulations effect a compensable taking, the owner's reasonable investment-backed expectations are to be taken into account. *Penn Central Transp. Co., supra*, at p. 124. In this case, the petitioner sought and the city has approved an "upzoning" of his property beyond the petitioner's reasonable investment-backed expectation in 1974 to have his property designated for recreational uses. Also, even

a regulation which deprives an owner of all economic use of his property will not effect a compensable taking if "the proscribed use interests were not part of [the property owner's] title to begin with." *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 2899 (1992). Under the instant facts, neither test would have been violated had Culver City refused to approve the General Plan amendment necessary for the townhome development. The recreational use was originally requested by the petitioner. Petition at p. 4. That recreational land use was made applicable to the property before the petitioner became the owner. Petition at p. 5. Based upon the foregoing law and facts, Culver City was under no obligation to modify its General Plan to permit the residential project.

In addition, providing for recreational facilities through conditions for dedication of land or payment of fees has been upheld as a valid governmental exaction. Even the majority of lower court decisions cited in *Dolan* in support of the "rough proportionality" rule validate the exercise of governmental authority to provide those public benefits. *Jordan v. Menomonee Falls*, 28 Wis.2d 608 (1965); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984); *Call v. West Jordan*, 606 P.2d 217 (Utah 1979); and *Collis v. Bloomington*, 310 Minn. 5 (1976).

Based on the foregoing, Culver City had authority to regulate land within its jurisdiction in order to provide for recreational uses. Under that authority, it could have refused to change the commercial recreational land use designation on the site or, as it did in this case, required the payment of a fee to reduce the impacts which would result from that change in use. With that legitimate and in

this case compelling state interest established, the next inquiry is whether the recreation fee and that state interest have an "essential nexus".

There is no doubt such a connection exists. The sole purpose of the recreation fee is to provide for recreational facilities. In the findings made to support the imposition of the recreation fee, Culver City expressly determined the fee would be used for replacement of community recreational facilities which were provided by previous land use restrictions applicable to the site. Petition Appendix M, p. M5; *Ehrlich, supra,* at p. 862; Petition Appendix A, p. A6. Therefore, the recreation fee serves the same legitimate interest served by Culver City's regulation of land uses, that is, to provide an opportunity for the creation of community recreational facilities. Based upon the foregoing, the *Nollan* "essential nexus" requirement has been met.

The petitioner states that if the mitigation fee is permitted to stand, then cities may require payments for removal of grocery stores, lawyers' offices and saloons. Petition at p. 20. This contention is no more than unfettered and unsupported hyperbole.

Any city would be hard pressed to be able to show, through satisfactory evidence, that loss of one grocery store, lawyer's office or saloon could cause a significant impact on the community. When so many other similar establishments would likely be readily available, it would be virtually impossible to require some special mitigation.

Unlike those uses, recreational facilities have been recognized to serve legitimate public interests and benefits, which can be served through development conditions. Based on the foregoing, this reason for granting review is clearly spurious.

III.

THE ART PROGRAM IS NOT A *PER SE* PHYSICAL TAKING OF PRIVATE PROPERTY

A physical taking occurs only when a governmental agency physically occupies private property.

> Because the Escondido rent control ordinance does not compel a landowner to suffer the physical occupation of his property, it does not effect a per se taking under *Loretto*.

Yee v. City of Escondido, supra, at p. 539. Prior to that holding, this Court decided *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982):

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad authority to impose appropriate restrictions upon an owner's *use* of his property. [Emphasis original.]

As stated earlier, pursuant to Culver City's art program a developer may place art work on a subject project

site and retain all ownership interest in that art work and the site. No publicly owned art work would be placed on the developer's property nor is any property given to the city. Alternatively, the developer may pay an in lieu fee. If that fee is paid, then no art work, either private or public, is placed on the developer's property. As discussed below, the program is more akin to aesthetic use regulations which require certain types of architectural design. Based on the foregoing, it is clear that no physical occupation of private property is required or even implicated by the art program.

IV.

NO HEIGHTENED SCRUTINY NEED BE APPLIED TO CULVER CITY'S ART PROGRAM

Culver City's art program requires neither a dedication of land or other property, nor the payment of any fees. Instead, it provides the owner of a large development with at least two options.[7] An art work can be incorporated into the development project or an in lieu fee can be paid to the city which is deposited into a special fund for the purchase of art work. In the first instance, the developer retains all right, title and interest in the art work. In the latter, Culver City could use the money to purchase art work to be placed on public property. The choice is left to the absolute discretion of the developer. The art requirement was adopted by ordinance through a legislative process and applies throughout the

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[7] The program exempts small developers and developers of affordable or senior housing projects.

city. Petition Appendix N, pp. N1-N12. The city made specific findings regarding the purpose of and reasons for the art program. Petition Appendix N, pp. N1-N2. The requirement is similar to other development conditions related to aesthetics, such as setbacks, open space, landscaping, color schemes, materials used and architectural design, all of which are valid exercises of a city's police power. The art program does not require the developer to give anything to the city.

Nothing in *Nollan* or *Dolan* indicates this Court intended to limit a city's police power as it relates to aesthetic regulations. The art program is merely a logical extension of the city's authority to regulate in the area of aesthetics. In numerous cases, this Honorable Court has stated that the police power extends to community aesthetics. *Penn Central Transp. Co., supra* (requirement to preserve landmark structures); *Agins, supra* (condition requiring scenic views); *City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984) (prohibition against posting signs in the public right of way). The city's art program is no more an exaction than are typical requirements for developers to incorporate into their developments certain architectural and design elements. As noted by the California Supreme Court, such development conditions are clearly within the City's police power. *Ehrlich, supra,* at pp. 885-886. Based upon the foregoing, Culver City's art program does not constitute an exaction subject to review under the *Nollan/Dolan* standards.

> "We accept beauty as a proper community objective, attainable through use of the police power." [Citation.] [¶] Present day city planning would be virtually impossible under a doctrine

> which denied a city authority to legislate for aesthetic purposes under the police power. Virtually every city in this state has enacted zoning ordinances for the purpose of improving the appearance of the urban environment and the quality of metropolitan life.

Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848, 861-862 (1980) (footnote omitted).[8]

If this Court embraces the petitioner's bold assertions that the art program must and cannot meet the *Nollan* and *Dolan* tests, then no city could require general landscaping, architectural amenities or other aesthetic related requirements as conditions of development. Under the petitioner's theory, unless Culver City could deny a requested permit because of its direct impact on landscaping, architecture or aesthetics in the city, it could not attach landscaping, and other design criteria as conditions of approval for a development. Such an absurd result is obviously not what this Court had in mind when it decided *Nollan* and *Dolan*. In fact, such a conclusion would be contrary to this Court's direction relating to a city's authority regarding aesthetics. As noted previously, this Court has stated time and again community aesthetics are concerns to which a city's police power

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[8] Although this ruling was reversed on other grounds in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the majority applauded the California Supreme Court's holding that the police power extends to aesthetic regulation, pointing out that this had placed California law "in accord with that of most other jurisdictions." *Id.* at p. 508 fn. 13; *see*, also *Id.* at pp. 530, 541 and 557 (agreement by concurring and dissenting opinions).

extends. The petitioner should not be permitted to uproot the long-standing holdings of this Honorable Court – holdings which have concluded that a substantial police power goal is promoted when a city regulates in order to advance aesthetic interests.

CONCLUSION

For the reasons stated herein, this Honorable Court is respectfully requested to deny the petition.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 13 1996
CLERK

No. 96-238

In the

Supreme Court of the United States

October Term, 1996

RICHARD K. EHRLICH, as trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965, Trust,
Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARDIES, AND PAUL A. JACOBS
Respondents.

Petition for Writ of Certiorari
to the California Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, RICHARD EHRLICH, AS TRUSTEE OF THE 1985 EHRLICH FAMILY TRUST AND AS TRUSTEE OF THE JULY 28, 1965, TRUST

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the nation and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

PLF joined with Richard K. Ehrlich (the petitioner in this case) in an amicus brief in support of Florence Dolan's petition for certiorari in *Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309 (1994), which this Court granted on November 29, 1993. PLF also supported Richard Ehrlich's first petition for certiorari, Case Number 93-842, before this Court which was granted on June 27, 1994, as reported at 512 U.S. ___, 114 S. Ct. 2731. PLF also participated as amicus, both in the filing of briefs and the sharing of oral argument time, before the California Court of Appeal and the California Supreme Court in this case.

Pacific Legal Foundation can provide a unique perspective to this Court's determination of whether it should again grant certiorari in this case. The Foundation's supporters who own property are all too familiar with the way that government uses the regulatory process to finance public goods. The Foundation has

over 23 years of experience in dealing with governmental entities who do not see private ownership of property as a means of enhancing the public weal through the harnessing of private enterprise. Instead these entities see private property either as an impediment to amassing greater governmental authority or as an opportunity to increase the public coffers or land base as a quid pro quo for agreeing to change a use restriction (such as changing a use designation, zoning, or granting a permit) that might enable a landowner to make reasonable use of land.

Consent to the filing of this brief has been granted by all parties to this case and letters of consent have been lodged with the Clerk of the Court.

OPINION BELOW

The opinion of the California Supreme Court is reported at *Ehrlich v. City of Culver City*, 12 Cal. 4th 854. The opinions and orders below in this case are reproduced in petitioner's appendix.

STATEMENT OF THE CASE

This case involves a most extreme application of the notion that when there is any change in the regulatory status of a parcel of property, the government may use the occasion of that change as a vehicle for demanding a "tribute" from the owner of the property. In this case Richard Ehrlich wished to have a land use restriction that permitted only a very particular type of commercial recreation on his vacant property, a recreation use on which he had been losing money for years until the facilities were lawfully demolished, replaced with another land use restriction that would accommodate condominiums. The City agreed to the change, but imposed a price. Two costs in particular are the subject of this litigation: Ehrlich had to pay $280,000 so the City could build four public tennis courts and Ehrlich had to either pay $33,200 (calculated at 1% of the value of the project) to the City for public art to be placed at a location of the City's choosing or Ehrlich had to agree to build and maintain public art on his property that would

be worth at least $33,200. Appellant's Appendix at A6-7, E4, G5-6, L5, N1-12. The California Supreme Court, allegedly applying a heightened scrutiny analysis, determined that the City could exact some sort of public recreation fee, although it declined to decide exactly how much that fee should be--allowing the City to make a new calculation of the fee.[1] The court further declined to apply heightened scrutiny to the arts fee because it was "legislatively" enacted. The fee was upheld under a relaxed standard of review since it was merely akin to an "aesthetic" regulation. 12 Cal. 4th at 881, 885-86.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

It is true, no doubt, that the public has many desires. It may also be true that a responsive government attempts to fulfill some of those desires. In this case, the public desires public art and public tennis courts. In the presence of these desires Richard Ehrlich sought a change in the restrictions placed upon the use of his property. The City of Culver City found this to be a splendid opportunity to demand that Richard Ehrlich fulfill the public's desires in exchange for modifying a regulatory restriction so that Ehrlich could put his property to reasonable use.

This Court has already indicated in *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Dolan v. City of Tigard*, 114 S. Ct. 2309, that the permitting process is not an occasion for a governmental entity to demand whatever it wishes from a person attempting to make reasonable use of property. In this case the

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[1] The Supreme Court remanded the case to the Court of Appeal, directing the case to be returned to the City of Culver City, thus terminating the litigation in California. 12 Cal. 4th at 887. As such, the decision of the Court below establishing liability for a fee is final and appropriately before this Court. In any event, the issue in Ehrlich's petition is not the amount of the fee, but the court's conclusive determination that any such fee could be imposed in the first place.

City as well as the courts below do not understand this Court's message. They believe that *Nollan* and *Dolan* do not necessarily apply when a property owner is told to write a check rather than write a deed. They believe that if a legislative body takes an outrageous exaction that is permissible because it is done in the open. They believe that if *Nollan* and *Dolan* do apply, the constitutional "nexus" and "rough proportionality" standards are easily satisfied when one land use restriction is replaced by another. That is because a land use restriction has the same effect as a servitude, meaning that a property owner can be forced to pay a fee to have the restriction (or servitude) altered. Thus it follows that the government can demand that a landowner provide to the public whatever public benefits that might have flowed from the original land use restriction. And they believe that legislatively imposed uniform exactions are virtually immune to challenge under the United States Constitution.

But as will be shown below, an attempt to alter the restrictions placed upon the reasonable use of property does not convert either the owner or the property into a money-tree for the government.

The lower courts are in hopeless conflict over the question of how the imposition of monetary permit exactions relate to the Takings Clause. Only this Court can resolve the confusion and misunderstandings of the lower courts.

I
THE CALIFORNIA SUPREME COURT FAILED TO UNDERSTAND THE LOGIC BEHIND NOLLAN AND DOLAN AND THUS FAILED TO PROPERLY APPLY THOSE CASES

If for no other reason, this Court should grant certiorari in order to dispel the persistent myth that land use permit conditions that exact land are subject to the Takings Clause of the United States Constitution while exactions of monetary fees are generally not subject to careful constitutional review, meaning that this Court's analyses in *Nollan* and *Dolan* can safely be ignored.

The California Supreme Court did not adopt the myth totally, in that it found that ***some*** of the fees in this case ***were***

indeed subject to the careful review called for in *Nollan* and *Dolan*. However, it was not able to grasp the relevancy of *Nollan* and *Dolan* to the art in public places fee, and it misunderstood ***why*** the exaction of adjudicatively imposed are subject to constitutional constraints. This misunderstanding ultimately led to the California court's affirmance of the imposition of some public recreational mitigation fee in this case, although it could not determine *how much* the fee would be.

First, with respect to the public recreation fee, the California Supreme Court did recognize that when fees are imposed in the context of an individual permitting process they may be subject to what it referred to as heightened judicial scrutiny under the takings analysis of *Nollan* and *Dolan*. However, the court erroneously focused on the way in which the fee was set, rather than on the constraints caused by the fee on the ability to utilize real property. Specifically, the court found that the public recreation fee was subject to close scrutiny because it was set during the "discretionary" context of an individualized permitting process. 12 Cal. 4th at 876. This is in contrast to legislatively imposed permit fees (and presumably other conditions) that are set in a different context. Because of the supposed greater potential for mischief in the former (a debatable proposition at best) *those* fees require closer review by the courts. *Id.*

The court's reasoning fails to follow the dictates of this Court on the application of the Takings Clause to permit exactions. The key is not the means by which the amount of the exaction or fee is set, but the effect of the exaction on the constitutionally protected right to make reasonable use of private property. In *Nollan* this Court recognized that the ability to utilize and develop real property, subject of course to reasonable permitting requirements, is a ***right*** and not a mere ***benefit*** conferred by the government. *Nollan*, 483 U.S. at 833 n.2. Thus, when government imposes something substantively more tangible and confiscatory upon a landowner than a mere permitting requirement, or a mere administrative fee, as a precondition for the ability to exercise the right to make reasonable use of property, reviewing courts must carefully analyze the nature of the imposition using the

standards of *Nollan* and *Dolan* to ensure that government does not overreach and take private property without just compensation.

To be sure, a requirement that a person dedicate real property to a public use is particularly intrusive of the rights of the affected property owner. Standing alone such a condition plainly would be a taking. In *Dolan*, for example, it would be quite logical to conclude that if Mrs. Dolan had been required to give up a bicycle path or greenway--***outside the context of a permitting process--that*** would have been a taking. *Dolan*, 114 S.Ct. at 2316. In fact, of course, Mrs Dolan did not agree to the condition and appealed. The reason why the city's action violated the Takings Clause was not because the city took Mrs. Dolan's land for a bike path or green belt (it had not yet done so) but because it was imposing a condition that it had not shown to be closely enough related to any impacts caused by Mrs. Dolan's project. It failed to substantially advance a legitimate governmental interest. The taking occurred because an unjustified restriction was placed upon Mrs. Dolan's ***right*** to make reasonable use of her property. The fact that the restriction would ***also***, by itself and standing alone, be a taking highlights the government's overreaching in the case--***but does not provide the essential rationale for the holding.***

Thus, nothing in the rationale of *Nollan* or *Dolan* suggests that heightened scrutiny of a land use regulation must be confined only to the circumstance where the condition of dedicating land is imposed. As is the case here, the exactions in *Nollan* and *Dolan* were imposed as conditions attached to a procedural prerequisite necessary to exercise the right to use property. The exactions in this case were not designed to ameliorate mere administrative costs. They were created to provide substantial public benefits that were ***not*** part of the project itself, will **not** benefit the project itself, and have **not** been shown to be related to any significant impacts caused by any project that would be facilitated by the removal of the existing "commercial recreation" land use designation. *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 1749-50 (1993), Appendix E9-10. Thus the condition imposed on Mr. Ehrlich fails to substantially advance a legitimate

governmental interest and is a taking. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

The holding that the exaction violated the Takings Clause would not logically be any different if Mrs. Dolan had been told to give enough cash to Tigard so it could buy the greenbelt and bicycle path from her. Heightened scrutiny would still be required because she could not exercise her right to reasonably develop her property unless she paid a bounty that was not related to improving her property. Indeed, if government were to demand that Mrs. Dolan give away enough money to enable it to buy a bike path that would be a taking of her right to make reasonable use of her underlying property just as much as a demand for Mrs. Dolan to actually build the bike path. The same applies for Mr. Ehrlich. Whether he is told to give away cash or tennis courts, cash or art, he is being told he cannot use his land without agreeing to an unrelated condition.[2]

Furthermore, many of the cases relied upon by the *Dolan* majority in formulating its "roughly proportional" nexus test involved ***fees***:

> All but one of the cases involve challenges to provisions ... requiring developers to dedicate either

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[2] Incidentally, just as the taking of Mrs. Dolan's bike path or greenway standing alone, would be a taking, so too would be the taking of her money. This Court has previously held that where government takes money the Takings Clause may be implicated. *See Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980) (Takings Clause applies to property right in money); *see also Village of Norwood v. Baker*, 172 U.S. 269, 296 (1898) (in condemning property for a street, a town cannot assess a property owner for the entire cost of the road); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 176 (1896) (assessment for water improvements must be in accordance with and in proportion to the benefits conferred by the improvement or else the Takings Clause is violated); *Wurts v. Hoagland*, 114 U.S. 606 (1885) (same). That money can be taken, of course, is not the dispositive factor here. It is that ***use*** of land is being unjustifiably restricted.

> a percentage of the entire parcel ... ***or an equivalent value in cash ... to help finance the construction of ... parks and playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment.***

114 S. Ct. at 2324 (Stevens, J., dissenting) (emphasis added).

The standards articulated in *Nollan* and *Dolan* for reviewing conditions imposed upon the use of real property are just as applicable if there is an involuntary transfer of realty as there would be for an involuntary cash payment. It is the lack of an adequate nexus between the exaction and the use of property that counts, not the precise nature of the exaction. Thus, when the California Supreme Court found that the standards of *Nollan* and *Dolan* applied to the exaction of a public recreation fee, it was correct but not because that fee was set in the give and take of a permitting procedure, but because the fee was interfering with the exercise of the constitutional right to use property. By focusing on the procedure by which the amount of the fee is set, instead of the impediments imposed on the exercise of the constitutional right, the California court failed to recognize the constitutional requirement that the effect of the fee must be, ***in all cases***, to offset some adverse consequences of the particular project proposed for the particular property. Unfortunately, the California court is not alone.

II

THERE IS A SERIOUS CONFLICT IN THE LOWER COURTS WHICH ARE STRUGGLING TO PROPERLY APPLY NOLLAN AND DOLAN TO THE IMPOSITION OF DEVELOPMENT FEES

A. Many Lower Courts Have Also Failed to Recognize the Rationale Behind Nollan and Dolan and Thus Have Failed to Apply the Proper Takings Standards

In the past few years many lower state courts have tackled the question of whether the heightened scrutiny of *Nollan* and *Dolan*

applies when a government imposes a fee upon the use of property when the fee is designed to subsidize a public benefit not related, or only marginally related, to any impacts caused by the project. This reluctance to apply *Nollan* and *Dolan* to monetary exactions has been especially pronounced when the exaction is imposed pursuant to a legislative act.

For example, in *Home Builders Association v. City of Scottsdale*, 902 P.2d 1347 (Ariz. App. 1995), the Arizona appellate court upheld the city's resource development fee that was imposed on land owners in order to build a new water supply infrastructure. The court found that while development fees are subject to a takings analysis, 902 P.2d at 1350, *Dolan* did not affect legality of the fee at issue and refused to apply heightened scrutiny because the fee was "legislatively" imposed. *Id.* at 1352.

In dissent, the presiding judge disagreed with the idea that "a legislative determination affecting the entire city" was exempt from the *Dolan* test. In the light of *Dolan*, he argued, the appellate court had been wrong to reverse the trial court (which had struck down the fee). He argued that the majority applied a standard that gave too much deference to the municipality's determination that the fee was proper as beneficial to the development. *Id.* at 1353.

In *Loyola Marymount University v. Los Angeles Unified School District*, 45 Cal. App. 4th 1256; 1996 WL 281345 (1996), a California Court of Appeal upheld a fee levied for the benefit of schools by the local school district on all commercial and industrial construction. The university did not challenge the fee as a taking but rather on the basis of due process, but nevertheless cited *Nollan* and *Dolan*. Providing a taste of the confusion that will follow in the wake of *Ehrlich*, the court concluded that, since "[u]nlike *Ehrlich*, the present case falls within the general category of development fees," "we conclude that the heightened scrutiny standards articulated by the United States Supreme Court in takings clause cases have no application in California cases involving development fees." 1996 WL at *10. In other words the Court of Appeal here interpreted *Ehrlich's* discussion of the distinction between legislative and individually applied fees as a carte

blanche for local governments to impose development ***fees legislatively*** and thus avoid serious constitutional analysis.

In *Arcadia Development Corp. v. City of Bloomington*, 1996 WL 453243 (Minn. App. 1996), a Minnesota appellate court upheld the imposition of a tenant-relocation fee imposed on owners of mobile home parks in exchange for permission to go out of the mobile home park business. The appellate court rejected application of *Dolan* to tenant relocation fees because the fee was legislatively imposed. It found that "once legitimate governmental interests are identified, courts simply require a nexus between the local legislation and the legitimate governmental purposes." Slip. op. at 5-6. Here, the "redistribution of the benefits and burdens of economic life" represented by the fee was a legitimate governmental purpose. Slip. op. at 6.

In *Garneau v. City of Seattle*, 897 F. Supp. 1318 (W.D. Wash. 1995), legislation provided that every low-income tenant displaced by demolition, change of use, substantial rehabilitation, or removal of use restrictions would be paid $2,000, half to be paid by the city and half by the landlord. The court upheld the fee, questioning whether *Nollan* and *Dolan* applied at all. 897 F. Supp. at 1325. The court relied on a Ninth Circuit decision, *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), for the proposition that *Nollan* changed the level of scrutiny only as to cases involving ***physical*** encroachments. Then, evidencing a misunderstanding of what this Court meant in *Dolan*, the court proceeded to find that, even if *Dolan's* rough proportionality test were applied, requiring the landlord to pay $1,000 for each displaced tenant's moving expenses would pass constitutional muster. 897 F. Supp. at 1326. The problem was that the court engaged in no analysis purporting to show a relationship between the fee and the owners' use of their property for other purposes. *See also Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App. 3d 892 (1986) (upholding a low-income tenant relocation fee prior to *Nollan*).

B. A Number of Jurisdictions Have Applied Nollan and Dolan Standards to Monetary Exactions, Including Some That Were Legislatively Imposed

Although courts in a number of jurisdictions have been reluctant to rein in local governments that use the permitting process as a public works slush fund, there have been at least a few that recognize that the standards articulated in *Nollan* and *Dolan* do apply to the imposition of development fees. For example, in *Northern Illinois Home Builders Association v. County of Du Page,* 884 P.2d 569 (Ill. Ct. Apps. 1994), the court cited both *Nollan* and *Dolan* as setting a new standard for analyzing monetary exactions imposed as permit conditions. Ultimately, the fee in question, designed to pay for new transportation projects, was struck down on statutory grounds.

In *Trimen Development Co. v. King Co.*, 877 P.2d 187 (Wash. 1994), a developer had been given the choice of dedicating or reserving land for open space or paying a fee in lieu of such dedication. The court properly recognized the applicability of the *Dolan* test to these ***legislatively*** imposed fees. 877 P.2d at 194. The fees were upheld, incidentally, as the court found that the fees were "reasonably necessary as a direct result of Trimen's proposed development." *Id.*

The broad applicability of the *Nollan* and *Dolan* analysis to conditions (of all types) imposed on a land use permit was recognized in *Clark v. City of Albany*, 904 P.2d 185 (Or. App. 1995), a case that did not involve development fees. In *Clark*, a restaurant was required to design and construct improvements on the street adjoining the site in exchange for a building permit. The court found this requirement to constitute an exaction subject to the *Dolan* requirement of rough proportionality. "[T]he fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies *only* to conditions of that kind." 904 P.2d. at 189.

The imposition of fees upon property owners which are designed to provide low-cost housing have been a particularly fertile area for government abuse. In addition to those cases described in the preceding section where such fees were upheld,

there have been a number with an opposite result. For example, before *Dolan* was decided, but after *Nollan*, the New York Court of Appeals struck down a fee imposed on owners of single room occupancy hotels in *Seawall v. City of New York*, 74 N.Y.2d 92, 544 N.Y. Supp. 2d 542, 542 N.E.2d 1059 (1989). The fee had been imposed by ***legislation*** and, as such, was uniformly applied. 542 N.E.2d at 1061-62. The court focused on the lack of a nexus between the complex problem of low-income housing in New York City and the landowners' use of their property for other purposes. *Id.* at 1069 ("Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem.")[3] Faced with the same facts, the *Ehrlich* court wold have upheld on two possible grounds. First, because the fee had been imposed pursuant to a legislative enactment, the *Ehrlich* court would apply only a deferential standard of review. Second, the fee was imposed to offset a change in a land use restriction, allowing the use of the property for something other than hotel rooms, depriving the public of the benefit of cheap hotel space.

In *City of Portsmouth v. Schlesinger*, 46 F.3d 133, 135 (1st Cir. 1995), the court reviewed a low-income housing fee that had been imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. *Id.* at 134. While the challenge to the fee was saddled with a statute of limitations problem, the court noted that the facts were undisputed that no "rational nexus existed between the amount of the Developers' . . . [fee] and any burden imposed on the City due to the zoning change." *Id.* at 135. If not for the limitations problem, the court would have struck down the fee. Under *Ehrlich*, however, the zoning change allowing condominiums on the site of low-income housing could have justified the fee.

Similarly, in *Aspen-Tarpon Springs, Ltd. v. George Stuart*, 635 So. 2d 61 (Fla. App. 1994), the Florida Mobile Home Act's

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[3] The court also found, as a separate ground for striking down the ordinance that it was a physical invasion. *Id.* at 1065.

relocation fee was found to be unconstitutional in that it unfairly singled out park owners thus failing to substantially advance legitimate governmental interest. Again, *Ehrlich* would mandate a conflicting result because the public would have allegedly lost land dedicated to mobile home parks and the owner could have a duty to mitigate this loss.

With some courts finding that *Nollan* and *Dolan* do not apply to development fees, and the *Ehrlich* court finding that at least some fees are subject to *Nollan* and *Dolan*, but not necessarily understanding why, it is plain that confusion is the hallmark of the lower courts today. Such confusion should be clarified by this Court.[4]

C. The Attention Focused on the "Legislative" Exception to the Takings Clause Has Been Questioned by Members of This Court and Other Courts as Well

The notion that exactions that are legislatively imposed should be treated any differently from those imposed as part of an individual permitting process has been questioned by members of this and other courts. For example, in *Parking Association of Georgia v. City of Atlanta, Georgia, Inc.*, ___ U.S. ___, 115 S. Ct. 2268 (1995), the Georgia Supreme Court upheld a requirement that parking lots dedicate 10% of their surface area to aesthetic improvements. Although this Court did not grant certiorari, it is notable that two members suggested that the time had arrived to review the reliance upon a "legislative enactment" rationale to avoid a careful scrutiny of certain exactions. 115 S. Ct. at 2269.

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[4] These cases are not, of course, concerned with legislatively imposed zoning schemes of general applicability which are not necessarily subject to the heightened scrutiny of *Nollan* and *Dolan*. *See Dolan*, 114 S. Ct. at 2316. It is the ***application*** of the exaction to individual parcels of property that gives rise to heightened scrutiny. Indeed, both *Nollan* and *Dolan* involved the application of legislatively imposed or broadly applicable conditions. *Dolan*, 114 S. Ct. at 2313; *Nollan*, 483 U.S. at 829.

Similarly, an Illinois appellate court agreed in *Amoco Oil Co. v. Village of Schaumberg*, 661 N.E. 2d 380 (Ill. App. 1995), that

> "although not binding as precedent, we find Justice Thomas' comments [in *Parking Association of Georgia*] particularly persuasive and consonant with the rationale underlying *Dolan* and similar cases. Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property." Id. at 390.

III

THE DECISION OF THE COURT BELOW TURNS TRADITIONAL UNDERSTANDINGS OF THE RELATIONSHIP BETWEEN PRIVATE PROPERTY AND GOVERNMENTAL REGULATION ON THEIR HEAD

The California Supreme Court announced the novel proposition, provided without citation, that "it is well accepted in both the case and statutory law that the discontinuance of a private land use can have a significant impact justifying a monetary exaction to alleviate it." 12 Cal. 4th at 879. From there the court proceeded on a speculative exegesis of the sort of fees that might be imposed on remand, suggesting that while replacing a private tennis club with public tennis courts might be too much of a reach, 12 Cal. 4th at 883, perhaps Richard Ehrlich could be assessed a fee to cover the "additional administrative expenses incurred in redesignating other property within Culver City for recreational use." *Id.* at 884. The court surmised that it would be permissible to impose a "fee [that] would enable the city to induce private health club development by offering monetary incentives roughly proportional to the land use incentive it relinquished when it removed the recreational use restriction from plaintiff's property." *Id.* In other words, Ehrlich would have to pay a large enough fee to induce another developer to come into Culver City, convert property from its current designated use to commercial recreation, and build a tennis and health club to replace the old one that

consistently lost money for a dozen years while operating on Ehrlich's property.[5] Unless the court was relying on the greater fool theory,[6] it is apparent that most developers would want a rather large sum of incentive money up front before they would build a club that was a proven money-loser in this community.[7] In short, for Ehrlich the fee to induce a new developer into Culver City wold be worse than the cure.

More problematic, however, is what this sort of formulation says about the court's understanding of property. Since the days of the Magna Carta it has been understood that a person has dominion over his property. As later explained by Blackstone,

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic

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[5] The court did not say whether Ehrlich would have to compensate the new developer for whatever fees might be required of *that* developer. Under the California court's analysis fees would be assessed against the developer to compensate the public for the loss of the allowed uses of the new parcel before the use designation is changed to commercial recreation. The court did not say how far this domino effect would go.

[6] When a speculator buys a commodity at an inflated price, hoping to sell it to another speculator at an even more inflated price, the "greater fool" theory is at work. Who but a fool would attempt to step into Ehrlich's shoes?

[7] Alternatively, a developer might demand other concessions, such as permission to build a different sort of club from the one that Ehrlich was restricted to by the detailed land use restriction on his property. Ehrlich was not able to do this because his parcel was too small. Appendix A-5, G-9. Treating a new developer differently further avoids rough proportionality because Ehrlich would be subsidizing a developer to do what he was not allowed to do--which was the cause of Ehrlich attempting to get the use restriction changed in the first place.

> dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

W. Blackstone, *Commentaries* 2 (1765). By having dominion over property, the owner is free to do--or not to do--with his property whatever the owner may desire--so long as the community and neighbors are not adversely affected. The ownership of property represents a place where the owner can be free from the control of others, where a person can enjoy a certain sense of personal liberty that is not dependent upon a governmental boon.

The relationship between private property ownership and liberty is well known to this Court. It has stated that

> the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right .... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).[8] And, in *Mayor v. Knoxville Water Co.*, 212 U.S. 1, 18 (1909), this Court wrote,

> "[o]ur social system rests largely upon the sanctity of private property; and that state or community which seeks to invade it will soon discover the error in the disaster which follows."

What this means, of course, should be obvious: property is owned by the owner and not the public. Nor is property owned in a euphemistic "cooperation" with either the government or the public. While property may be regulated to prevent activities on property from having an adverse impact on neighboring property, it has never been understood, at least in nations with an English common law heritage, that the public gains a permanent right or servitude in a person's private property from the imposition of a regulation.

Zoning laws, for example, are regulations designed to prevent owners from using property in a way that is detrimental to neighboring owners or the community--before the harm is done. By establishing zones where it can be safely assumed that certain designated uses will not have an adverse public impact, the task of

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[8] This is, of course, what John Locke was explaining in the SECOND TREATISE ON GOVERNMENT, when he stated, "it is not without reason that he [man] seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name- property." Paragraph 123. For an opposing view, *see* Marx and Engels, THE COMMUNIST MANIFESTO, ch 2, ¶ 14, which dismissed the idea of "the right of personally acquiring property as the fruit of a man's own labour, which property is alleged to be the groundwork of all personal freedom, activity and independence" as no longer being relevant in times dominated by the bourgeoisie. *See also Block v. Hirsh*, 256 U.S. 135, 165 (1921) (McKenna, dissent) ("[t]he security of property next to personal security against the exertions of government is of the essence of liberty.")

regulating property is simplified. Under most zoning laws, however, an owner always should have an opportunity to prove that another use will not have an adverse public impact. But under no circumstances can it rationally be suggested that by establishing a specific zoning or land use restriction, the public has acquired a ***right*** to enjoy whatever benefits it may receive from the owner's use of the property in accordance with the established restrictions. But never before has a court found that there is a ***right*** owned either by the public or a land owner to the perpetual enjoyment of the status quo of existing land use restrictions.[9] This Court can clarify that the application of a land use restriction does not give the public a perpetual right to that restriction and does not give the community the right to demand payment when the land use restriction is changed.

The imposition of land use restrictions does not alter the fundamental nature of property ownership. It does not transfer dominion from the owner to the public. And yet the road embarked upon by the California Supreme Court, whether or not the court so intended, leads to an inexorable destruction of traditional understandings of property. People will be seen in the future to own their property in a "partnership" with the government. Land use restrictions will not represent attempts to prevent mischief to neighbors and the community but will be a unilateral imposition by the government of a vested interest in the future use of the property. An owner will have only the dominion over property that the owner's larger partner will allow. As happened to Richard Ehrlich, an owner desiring to change a land use restriction can be forced to "buy" out the larger partner. In short, the ownership of property will lose its character as an individual right and will become in a real sense just one more government entitlement.

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[9] Indeed under California law it is clearly established that the property owner has no vested right in any use allowed by zoning. *Avco Community Developers Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785, 796 (1976).

CONCLUSION

This Court has an opportunity to lead the California and other errant courts back from a troubling path. By granting certiorari in this case, this Court can determine whether a property owner actually owns land in the traditional sense or whether the public now owns a continuing right to enjoy the "benefits" of whatever land use restrictions the community placed upon a parcel of property in the past--even if those benefits have not yet been realized or have been lawfully discontinued. The lower courts are in a state of confusion. They have looked at *Nollan* and *Dolan* without recognizing the fundamental premises of property ownership that are the foundation for the application of the Takings Clause in these cases. Without this understanding, many lower courts are adrift, upholding exactions and finding artificial reasons not to apply the discipline invoked by these cases.

For all these reasons, this Court must grant certiorari in this case.

DATED: September, 1996.

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Supreme Court, U.S.
FILED
OCT 4 1996
CLERK

(6)

No. 96-238

In the
Supreme Court of the United States
October Term, 1996

RICHARD K. EHRLICH, as trustee of the 1985 Ehrlich Family Trust and as Trustee of the July 28, 1965, Trust,
Petitioner,

v.

CITY OF CULVER CITY, CITY COUNCIL OF THE CITY OF CULVER CITY, STEVEN GOURLEY, JOZELLE SMITH, JAMES BOULGARDIES, AND PAUL A. JACOBS
Respondents.

Petition for Writ of Certiorari
to the California Supreme Court

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This reply will address the procedural issues raised by the City of Culver City's Brief in Opposition to Richard Ehrlich's Petition for Certiorari. The City's arguments on the merits are more than adequately addressed in Ehrlich's petition as well as those of amici.[1] Petitioner will also in this reply brief direct this Court's attention to a law review article that was unavailable at the time that the opening brief was filed.

I

PROCEDURALLY, THIS CASE IS READY FOR REVIEW

Respondents, Culver City *et al.*, cannot deny the regulatory implications of the California Supreme Court's holding below that a landowner may be forced to pay an indulgence when an existing restriction on the use of land is altered. Respondents do not deny that the fees in this case are being imposed not because of any impact caused by any actual development of the property but because the change in land use restrictions will preclude certain uses in the future

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[1] Except it must be pointed out that the City's curious contention on Pages 22 to 23 that large exactions can be more readily imposed on businesses that are unique as compared to those that are more pedestrian is reason enough for granting the writ of certiorari. Such logic would give new meaning to this Court's explanation of the Fifth Amendment in *Armstrong v. United States*, 364 U.S. 40, 49 (1960): "The Fifth Amendment's guarantee ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Culver City would modify the words "some people" with "some people, except for those with unique businesses enterprises."

that might be beneficial to the community. Respondents' Brief in Opposition attempts to divert this Court's attention away from the profound implications of the decision below by focusing instead on charges that new arguments are being raised for the first time in Ehrlich's petition or that the decision below is not sufficiently final. While this Court has, of course, been reluctant to grant certiorari in cases that lack finality, this case *is* final and all claims raised in the petition for certiorari *were* raised below.

A. That the Arts in Public Places Fee Constitutes a Taking Through a Physical Invasion Was Raised Below

In exchange for the change in the land use designation that permitted the construction of condominiums, Culver City required Richard Ehrlich to either pay $33,200 to the City so that it could buy public art or to place $33,200 worth of public art on his property.[2] In his petition for writ of certiorari, Ehrlich claims that forcing him to either pay for public art or have art placed upon his property is an unconstitutional physical taking without the payment of just compensation. Ehrlich's Petition at 28-30. Culver City

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[2] Culver City objects to the use of the adjective "public" for the art placed on Ehrlich's property because, presumably, he still owns it. However, California law states: "'Public facilities' includes public improvements, public services, and community amenities." Government Code § 66000(d). Furthermore, Ehrlich and his successors in interest (the condominium homeowners' association if they were to take title) does not exactly "own" the art in the traditional sense because federal law prohibits the conversion of art into other uses such as, for example, scrap metal, without the permission of the artist. *See* Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a)(3).

argues that this argument was never raised before. Culver City's Opposition at 15-17. However, it has been made clear from the beginning in this case that Ehrlich alleged that the public art fee in this case was a taking. For example, Ehrlich's Verified First Amended and Supplemental Petition for Writ of Mandate and Complaint for Declaratory Relief filed on November 21, 1988, states at Page 19, Page 80, that the "CITY'S actions have resulted in a taking of Ehrlich's property in violation of ... the Fifth and Fourteenth Amendments." Paragraph 76 on Page 17 defines the "CITY'S actions to include the arts fee exaction."

This Court made plain in *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992), that:

> Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are rather separate arguments in support of a single claim--that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

More to the point, however, Ehrlich ***did*** demonstrate in the state court proceedings that the arts fee was a physical invasion. In Ehrlich's supplemental letter brief to the California Court of Appeal filed August 31, 1994, Ehrlich stated: "If the art cannot be placed in eyesight of the public, the property owner must permit entry onto the property for viewing by the public at large." Letter brief at 8. In Ehrlich's Opening Brief to the California Supreme Court, filed May 17, 1995, Ehrlich wrote, "the City's ordinance requires that Petitioner acquiesce in the ***permanent physical occupation*** of property in the form of public art and *access*

by the public to view the art. ... Such ***physical occupation*** constitutes a per se regulatory taking." Opening Brief at 32 (italicized emphasis in original, italicized and bolded emphasis added, citation to record omitted).

The City of Culver City has surely read these briefs. Its claim that physical occupation arguments are being presented for the first time in Ehrlich's Petition for Review is utterly without merit. Furthermore, as the arts fee issue was ***not*** remanded to the city for further review, it is undeniably final and ready for immediate review.

B. The Issues Presented to This Court for Review Have Been Decided with Finality

As noted in Ehrlich's petition for certiorari's discussion of jurisdiction at Page 2, Footnote 1, the importance of this case rests not on the ***amount*** of the public recreation fee, but on the fact that ***any*** fee could be imposed at all for the purpose of ameliorating the "loss" to the public of the "opportunity" to play tennis on Ehrlich's allegedly "private" property. Culver City, however, devotes over seven pages to an argument that because the calculation of the amount of the fee remains undecided, this Court lacks jurisdiction. Culver City's opposition at 8-15.

The California Supreme Court, however, has decided conclusively and without equivocation that fees may be imposed on property owners when a land use restriction is altered. Such fees are solely for the purpose of using a landowner's money to help finance public facilities that would allow the public to enjoy the same sort of activities that the landowner ***might*** have ***voluntarily*** provided under the previous land use restriction. *Ehrlich v. City of Culver City,* Opinion of the California Supreme Court, reproduced in

Petitioner's Appendix A at A-34. ***Nothing on the remand of this case can change this holding one iota.***

Landowners throughout California are stuck with this holding. Ehrlich is stuck with this holding. That the ultimate amount of the fee might be more or less than the original $280,000 does not alter the essential loss of a property interest held by Ehrlich and other private landowners in California.

This case is final for purposes of this Court's review. This Court has recognized that state court decisions can be final for purposes of review even when further proceedings are available below. For example, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.1 (1971), this Court found finality after a ***temporary*** injunction had been issued, noting: "Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing." Similarly, the existence of liability in Ehrlich's case will not be altered by further hearing.

This case is also analogous to *Brady v. State of Maryland*, 383 U.S. 83, 84 n.1 (1963), where this Court found a case final where a determination of guilt, but not punishment had been made by the state court. Here of course the analogy to guilt is the existence of liability for owning property that experiences a change in a land use restriction. Only the punishment, or the amount of the fee, remains to be determined by the City.

Culver City argues that *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), should be read as providing for finality in these circumstances under only the narrowest of circumstances and if a mechanical application of one of four exceptions applies. *See* Culver

City's Opposition Brief at 8. Commentators, however, consider this case to be a "major restatement of practical finality doctrine." Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, § 4010 at 586 (1977). In *Cox Broadcasting*, this Court eschewed applying finality in a "mechanical fashion." 420 U.S. at 477, preferring "'a more liberal, and, as we think, a more reasonable construction,'" *Id.* at 480 (citing *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848)). In *Cox Broadcasting* this Court found that it often

> has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice."

420 U.S. at 477-78 (footnote and citation omitted).

The present case easily falls within the ambit of all four *Cox Broadcasting's* exceptions. "In the first category are those cases in which there are further proceedings--even entire trials--yet to occur in the state courts but where for one reason or another the federal issue is conclusive." *Id.* at 479. Culver City claims that because the amount of the exaction has not yet been determined the federal question has not been conclusively decided. Opposition brief at 9. Culver City is wrong. The California Supreme Court determined that the Takings Clause of the United States Constitution does not preclude imposition of a recreation fee or the arts fee. Petitioner's Appendix at A-34, A-42, A-45-

46. The federal question has been decided. This is conclusive. *See also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306 (1989) (finality of rulemaking found even in face of remand on *amount* of rates).

Citing *Brady*, *supra*, this Court explained that a second exception is found "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." Culver City argues that because the amount of the fee is uncertain, and that because perhaps no fee would be imposed the federal issue may not survive.[3] Opposition brief at 8. However, no matter what sort of fee Culver City finally decides to impose, Ehrlich and other property owners in California will have suffered a taking of their property by virtue of the California Court's determination that land use restrictions placed upon property create some sort of public easement that can be altered only if the landowner is willing to pay a price. In *Cox Broadcasting*, citing to *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), this Court explained that "[n]othing that could happen in the course of the accounting, short of settlement of the case, would foreclose or make unnecessary decision on the federal question." 420 U.S. at 480. The "accounting" of the amount of the fee in the present case is irrelevant to the issue of ultimate liability. The unlikely event of settlement here, as in *Radio Station WOW* is not enough to erase finality.

The third exception is for cases where the federal question could not be reviewed after further state proceedings. 420 U.S. at 481. Upon remand the City of Culver City can impose some sort of fee. The calculation of

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[3] The imposition of "no fee"is probably the only settlement Ehrlich would accept--assuming Ehrlich's attorneys' fees were paid.

the amount of that fee may be challenged. ***But the imposition of liability will not be appealable***. That issue will be res judicata. The California Supreme Court has decided the matter and no further proceedings will alter that result. Under the Rules of this Court, no appeal of the California Supreme Court's decision will be possible after this point in time. Supreme Court Rule 13.1 (Petition for Certiorari must be filed within 90 days of final state court decision). Any purported challenge to the California Supreme Court's in the years ahead will be untimely and unreviewable. *See also Pennsylvania v. Richie*, 480 U.S. 39 (1987) (federal question finally decided and later review of the federal question would be, at least for the most part, impossible).

The fourth exception in *Cox Broadcasting* involves cases where Court reversal of a state court decision could preclude any further litigation and refusal of immediate review "might seriously erode federal policy." 420 U.S. at 482. A decision by this Court in favor of Ehrlich would serve both of these ends. If this Court were to find that the imposition of a land use restriction does not create a virtual zoning easement owned by the public such that a landowner must pay to have it altered, then the recreation fee could not be sustained under any circumstance present in this case. In that case further state court litigation would be precluded. Furthermore, the policy embodied in the Fifth and Fourteenth Amendments proscribing takings without the payment of just compensation would be seriously eroded if this case is not brought to a timely close. There are limits to the Ehrlich's resources and ability to carry on this protracted litigation. The state court opinion below will stand as binding precedent for the State of California no matter what happens on remand. Federal policy as embodied in the Constitution would not be well served if this case is not taken for appeal ***now***. Under all the factors of *Cox Broadcasting* this case is final and ready for review.

II

A NEW LAW REVIEW ARTICLE DEMONSTRATES THE ABERRATIONAL NATURE OF THE DECISION

Counsel for Ehrlich has just been made aware of a new law review article on the subject of the *Ehrlich* opinion. *See* Gideon Kanner, *Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal*, 25 REAL ESTATE L. J. 214 (In Press 1997) (available upon request). The article characterizes the decision with the statement that "if ever a fragmented court rendered a revolutionary, yet muddled decision, this was it." *Id* at 217. It concludes: "Chief Justice Rehnquist's *Dolan* admonition notwithstanding, property rights remain very much a constitutional 'poor relation' in California." *Id* at 243.

CONCLUSION

For the above reasons, as well as those in Ehrlich's petition and amici briefs in support, this Court should grant Richard Ehrlich's petition for writ of certiorari.

DATED: October, 1996.

Respectfully submitted,

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